127-484

(5)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

~~No. 149.~~ 14

THE KANSAS PACIFIC RAILWAY COMPANY,
APPELLANT,

vs.

BENJAMIN W. LEWIS, JUNIOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED OCTOBER 12, 1883.

153 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the record and proceedings in a certain suit therein lately depending between J. Ernest F. Zeh et al., plaintiffs, and John F. Hartranft, collector of customs for the district of Philadelphia, defendant.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court, at Philadelphia, this first day of August, A. D. 1885, and in the one hundred and tenth year of the Independence of the said United States.

SAMUEL BELL,
Clerk of Circuit Court U. S., Eastern District of Penna.

(Indorsement on cover:) No. 270. John F. Hartranft, collector of customs, plaintiff in error, vs. J. Ernest F. Zeh and Albert Schenck, trading as Zeh & Schenck. E. Pennsylvania C. C. U. S. Filed August 11, 1885.

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1 Be it remembered that heretofore, on the 29th day of June, A. D. 1878, a petition and precipe was filed in the office of the clerk of the district court of the county of Douglas and State of Kansas, and is in words and figures as follows, to wit :

Petition.

In District Court, Douglas County, State of Kansas.

BENJAMIN W. LEWIS
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, and THE KANSAS PACIFIC RAILWAY COMPANY, Defendants.

The plaintiff above named complains of the defendants above named and alleges:

1st. That under and by virtue of a certain charter and act of the Governor and Legislature of the Territory of Kansas, entitled An act to incorporate the Leavenworth, Pawnee and Western Railroad Company, approved on or about the first day of February, 1855, the defendant herein, The Kansas Pacific Railway Company, was duly incorporated under the aforesaid name of the Leavenworth, Pawnee and Western Railroad Company ; that subsequently, pursuant to and by virtue of the laws of the State of Kansas, its name was changed to Union Pacific Railway Company, Eastern Division, and under the said name and title it issued the securities hereinafter mentioned and described, and transacted its business until its name was, according to law, altered to the present title of the Kansas Pacific Railway Company.

3rd. Plaintiff further says that said company became possessed of all the rights, privileges, franchises, and property contained in and granted by the several acts of the Legislative Assembly of the Territory of Kansas and of the Legislature of the State of Kansas, and also by an act of the Congress of the United States en-

2 titled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1st, 1862, and the several acts amendatory thereof and supplementary thereto, and particularly of the act of Congress passed July 2, 1864, as [by] reference to the said acts will now fully appear ; and your petitioner prays that all of the aforesaid acts may be taken and received as a part of this his petition.

4th. Plaintiff shows that the said corporation was thereby authorized to locate, construct, and operate a certain railroad and telegraph line in the State of Kansas from the mouth of Missouri river westwardly beyond the one hundredth meridian, and from and to other points, and thereon to transport persons and property for hire and reward ; that certain other powers were also conferred upon said corporation to enable it to acquire, hold, and use real estate and personal property, and to enable it to carry into effect the purposes of said railroad in and about the construction of said railroad and

the prosecution of its said business it was empowered to mortgage any of its property and franchises.

5th. Plaintiff further shows that in pursuance of the powers vested in it by said several acts, and for the purpose of enabling it to construct its road-bed and railway and equip the same, the said Union Pacific Railway Company, Eastern Division, on the first day of July, 1866 (6), executed its certain bonds to the amount of $4,275,350, four million two hundred and seventy-five thousand three hundred and fifty dollars, said bonds being in denominations of ($1,000) one thousand dollars, ($250) two hundred and fifty dollars, and ($100) one hundred dollars, and payable to said Carlos S. Greeley and Adolphus Meier, trustees, or bearer, at the city of New York, on the first day of July, 1916, and commencing to bear interest four
3 years after their date at the rate of seven per cent. per annum out of the net earnings, as therein provided. All of said bonds are of the same tenor and date, and differ only in the number marked thereon. A copy of said bonds and coupons (marked Exhibit "A") is attached hereto for the information of the court as to the form and nature of the obligation and made part hereof, the other of said bonds differing from this only in their number and amount.

6th. Plaintiff further shows that in pursuance of its power for that purpose, and to enable it to negotiate the said bonds and procure the loan of money which it required for the accomplishment of its enterprise, the Union Pacific Railway Company, Eastern Division, executed and delivered to said Carlos S. Greeley and Adolphus Meier its certain mortgage in trust and for the security of those who might become holders of the bonds hereinbefore described and of the said interest warrants thereto attached. In and by the said indenture the Union Pacific Railway Company, Eastern Division, bargained, sold, transferred, and conveyed the following-described property, to wit: "All the said railway and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, and from Wyandotte, in the State of Kansas, westerly to such point west of the one hundredth meridian to which the grant in bonds from the United States, by virtue of the several acts of Congress passed in aid of said company, extend, and of said company's said branch road from Leavenworth to the junction near Lawrence as aforesaid, with the road-bed, superstructure, and all rails and other material used therein or procured therefor, and all machinery, locomotives, cars, and rolling-stock, bridges, viaducts, culverts, fencing, depots, sidings, and station grounds, telegraph poles, wire, instruments, and buildings erected thereon and all rights therein, tolls and income, and any rights thereto or interest therein, together with the tolls or income to be had or levied there-
4 from, and all the rights, franchises, and privileges of the Union Pacific Railway Company, Eastern Division, of, into, and concerning the same, whether the same is at present possessed or may in the future be acquired by the said party of the first part," namely, the Union Pacific Railway Company, Eastern Division. A copy of said deed, commonly known as the income mort-

gage, is hereto attached and made a part of this bill of complaint, marked Exhibit "B."

The said deed was duly subscribed and sealed by the parties thereto, and was thereafter properly recorded in the offices of the register of deeds of the counties of the State of Kansas in which the said railroad lies.

7th. Plaintiff further shows that the bonds hereinbefore described and intended to be secured by the said mortgage were, after being duly certified, issued by the said corporation and negotiated to parties who advanced valuable considerations therefor, and the said bonds became valid and subsisting debts of the said company and valid and subsisting liens upon the property and franchises thereof, according to the terms of said mortgage. From some of the said bonds which were issued in 1866 the first ten coupons to fall due were detached, and the said issue is commonly known as number eleven. From the bonds of a subsequent issue in 1868 fifteen coupons first falling due were cut off before negotiating, and this later issue is commonly known as number sixteen. This detachment of interest warrants was for the purpose of carrying out the provisions of the deed of mortgage and making the said issue of bonds non-interest-bearing until 1871 and 1874, respectively.

The numbers of said bonds known as No. 16 and the number known as No. 11 are unknown to plaintiff, but none of said bonds or the coupons attached to said bonds which have fallen due since the said years, and which are payable on the first day of March and September in each calendar year, with interest from their respective dates, have been paid or any part thereof.

5 8th. Plaintiff further shows that the Kansas Pacific Railway Company wholly failed and made default in the payment of the interest warrants or coupons belonging to said income bonds which became due according to the tenor of the said security. The defaults on the said bonds have been as follows: On the outstanding issue of the income bonds which carried interest from the first day of September, 1871, and are commonly known as number eleven there was a default in the payment of interest on the first day of September, 1871, and on the first days of March and September of each year thereafter successively to the present time. On the outstanding issue of the income bonds which commenced to bear interest, according to their tenor, on the first day of March, 1874, there was a default in the payment of interest on the said day and on the first day of March and September of each year thereafter and until the present time.

9th. Plaintiff further shows that the Kansas Pacific Railway Company was fully competent to perform its covenants in the mortgage and had acquired net earnings sufficient to pay the interest on said bonds at the times above specified when the defaults occurred, and after the payment of interest on the prior incumbrances which existed in superiority to the lien of the income mortgage bonds. Plaintiff shows that the lien of their income mortgage covers the main line of the road from Kansas City to the 394th mile post, not including that portion of the main line west thereof, and which is

commonly known as the Denver extension, and which was built subsequently to the execution of said income mortgage, and — to the issue of the said bonds and also the branch road of said company from Leavenworth to the connection of the main line near Lawrence. The net earnings upon the eastern section of the road, to which said mortgage attaches, have always been greater and in a much larger proportion by mileage and in respect of all other standards
6 of profit than the earnings of the said Denver extension. The net earnings of said eastern section, after repairing or replacing the railroad way, its appurtenances and equipments, and of providing additional equipments and satisfying prior liens, as provided in the income mortgage, were ample and more than sufficient to have paid the interest on the entire issue of income bonds at the time of the default above set forth.

10th. Plaintiff annexes hereto a schedule of the earnings of the railroad, marked Exhibit "E," and prays leave to refer thereto in proof that the net earnings have been, at all times, sufficient to pay the accruing interest on the income bonds according to the mortgage contract of this corporation.

11th. Plaintiff shows that the net earnings of the said property have been at a rate ample to pay the interest on the income bonds and all the interest thereof. The net earnings of the road to the 394th mile post have been in a ratio and to an amount far in excess of the sums required for the said interest payments.

12th. Plaintiff further shows that in and by the second paragraph of article four of the income mortgage it is further declared and agreed that the default contemplated shall consist in the omission to apply the net earnings for any calendar year to the payment of interest on the bonds secured thereby according to their tenor; and in and by the third paragraph of the same article it is declared that the application of net earnings to the payment of interests shall be made on the first days of January and July or each year, and shall be paid on the first days of March and September next following; and in and by the fourth paragraph of the fourth article it is further declared and agreed that in case there shall be net earnings of the said railway, and it shall so appear that the same are not sufficient to pay the said interest warrants as they respectfully fall due,
7 they shall remain in the treasury of the company and be added to the net earnings, as herein defined, on each succeeding half calendar year until the accumulated net earnings shall amount to a sum sufficient to pay one set of said overdue coupons in the order of their maturing in point of time.

13th. Plaintiff further shows that the railway company, defendant, has failed to perform each and all of the aforesaid covenants, and to make the application of the moneys required to pay the interest which became due as aforesaid on the income bonds, and by reason of the said defaults the conditions of the said mortgage have been broken and the title in and to the said railroad and property has become vested in the holders of the income bonds or their legal representatives, and the right of the said railway company to possess, operate, and enjoy the said railway, and to take and use its

tolls and profits have become forfeited and become vested under the power of the mortgage or belong of right to the holders of the said income mortgage bonds.

14th. Plaintiff shows that since the execution of the said income mortgage and the issue and negotiation of the bonds secured thereby the railway company, defendant, has executed mortgages and imposed liens upon its land grant acquired by virtue of the act of Congress, and the company has surrendered possession of the same to the various mortgagees thereof and have failed to elect to apply its lands to the satisfaction of the holders of the securities under the income mortgage, as therein provided.

15th. Plaintiff says that, the trustees in said income mortgage, Adolphus Meier and Carlos S. Greeley, having successively renounced their trusts imposed by said income mortgage upon them, *that* the said Adolphus Meier did, on the 27th day of June, 1878, assign and transfer all his interests in said trust property to this plaintiff,

8 and afterwards, on the same day, the said Carlos S. Greeley did assign and transfer all his interest in said trust property to this plaintiff, which assignments were duly entered upon and attached to said income mortgage, copies whereof are filed herewith, attached to a copy of said income mortgage and marked Exhibit "B" and made a part hereof. Plaintiff has, pursuant to the terms of said mortgage and said assignments, become the trustee for all the holders of the bonds issued under said mortgage in place and stead of said Adolphus Meier and Carlos Greeley; tha the has, in writing executed by the holders of the said bonds to the amount of one hundred thousand—or more, been duly requested to act as such trustee and to bring suit to foreclose said mortgage and enforce the liens and rights of the holders of said bonds secured by said income mortgage, and none of said bondholders have objected thereto; that said bondholders have furnished plaintiff with a statement of the earnings of the said defendant railroad company, which said statement is made Exhibit "C," hereto attached and made a part of this petition, and upon such statement have demanded the institution of proper suits to enforce the rights of the bondholders. Plaintiff, assuming said statement to be true, has made the averments hereinbefore mentioned in respect to the net earnings of said railroad covered by said income mortgage.

16th. Plaintiff says that he makes said Adolphus Meier and Carlos S. Greeley defendants with the said Kansas Pacific Railway Company, and as to the said Meier and as to said Greeley prays that they may answer whether they pretend to have any further interest or right in said trust property, or claim to enforce said income mortgage as trustees thereof, and, further, whether they did or not execute said assignment as shown in the Exhibit "B" attached hereto, and that the railroad company, defendant, may state and show, if it can, any fact or thing whereby it may be made to appear that this plaintiff has not the right to enforce the right

9 of the bondholders under said mortgage and have judgment for the amount due said bondholders from the net earnings,

as provided in said mortgage, and in default of payment hereof have judgment of foreclosure for the same, as provided by law.

17th. Plaintiff makes the said Kansas Pacific Railway Company defendant with the said Adolphus Meier and Carlos S. Greeley, and prays that they may answer the petition and that an account may be made and taken, as the court shall direct, of the net earnings of said defendant railway company, as provided by said income mortgage and as is hereinbefore alleged, and that upon the coming in of said account, if to the court it shall seem meet and proper, that said defendant railway company be decreed to pay the same to plaintiff at some short day to be named, and in default thereof that plaintiff have judgment for the sale of said mortgaged property, and that plaintiff may have such judgment as the laws of the land provide. Plaintiff demands judgment for two millions of dollars, for the foreclosure of said mortgage, for a sale of the mortgaged property, and for such other and further relief as may to the court seem just and equitable, and for costs of suit.

J. W. GREEN,
Att'y for Plaintiff.

District Court.

STATE OF KANSAS, *Douglas County:*

The clerk of said court will issue summons in the above-entitled action to the sheriff of said county, returnable in ten days.

Plaintiff asks judgment for two million dollars, for foreclosure of mortgage, sale of mortgaged premises, equitable relief, and costs of suit.

J. W. GREEN,
Att'y for Plaintiff.

Service of summons is hereby waived and appearance is hereby entered.

J. P. USHER,
Att'y for Meier & Greeley.
CHAS. MONROE,
Attorney for Defendant, Kansas Pacific Railway Company.

I am security for costs herein.

J. W. GREEN.

Approved.

B. D. PALMER, *Cl'k,*
By W. J. NEILL, JR., *Deputy.*

10 EXHIBIT "A."

UNITED STATES OF AMERICA.

Income Bond. $100 *dollars.* No. 254. Loan of $10,000 per mile. The Union Pacific Railway Company, Eastern Division. Seven per cent. income bond. One hundred dollars ($100).

Know all men by these presents that the Union Pacific Railway Company, Eastern Division, will pay to Carlos S. Greeley and Adol-

phus Meier, or bearer, one hundred dollars, lawful money of the United States of America, on the first day of July, one thousand nine hundred and sixteen, in the city of New York, with interest thereon from the first day of July, one thousand eight hundred and sixty-six, at the rate of seven per cent. per annum, said interest payable semi-annually out of the net earnings of the said railway company in the order of time at which the interest-warrants hereto attached mature, and as provided in the deed of trust securing the entire issue of which this bond is a part.

This bond is one of an issue of bonds, all of date first day of July, one thousand *and* eight hundred and sixty-six, the payment of which is secured by deed of trust of that date, duly executed and delivered by the Union Pacific Railway Company, Eastern Division, to Carlos S. Greeley and Adolphus Meier, conveying the railway of said company and the equipments and appurtenances therein described, subject to the prior liens stated in said deed of trust, which has been duly recorded; and this bond is also on an equality in all respects with bonds of the denomination of $1,000, $250, and $100 each issued by the said company to said Greeley and Meier, trustees, and
11 amounting, in the aggregate, to $10,000 per mile, and no more, on the completed portion of said road. This bond shall not become obligatory until it shall have been authenticated by a certificate hereon and duly signed by the trustees.

In witness whereof the said Union Pacific Railway Company, Eastern Division, have caused their corporate seal to be hereto affixed and the same to be attested by the signatures of their president and secretary on the first day of July, one thousand eight hundred and sixty-six.

The United States revenue stamps are affixed and cancelled on the mortgage given as security for these bonds.

[L. S.] JOHN D. PERRY,
President Union Pacific Railway Company.

Attest: CHAS. B. LAMBORN, *Secretary.*

Coupon.

The Union Pacific Railway Co., Eastern Division, will pay to bearer three & $\frac{50}{100}$ dollars out of the net earnings of its railway, as provided in deed of trust to Carlos S. Greeley and Adolphus Meier, dated July 1st, 1866, for 6 mos.' interest on its income bond No. 254.

JOHN B. PALMER, *Treas.*

No. —. *Income Bond.* $100.

The Union Pacific Railway Company, Eastern Division. Due July 1st, 1916. Coupons payable Mar. 1 & Sep. 1st.

This bond is one of the series provided to be issued by the mortgage herein referred to, & no more bonds have been certified to by us than is provided for in said mortgage.

CARLOS S. GREELEY &
ADOLPHUS MEIER,
Trustees.

12 EXHIBIT "B." Mortgage.

This indenture, made this first day of July, one thousand eight hundred and sixty-six, between the Union Pacific Railway Company, Eastern Division, a corporation created under the laws of Kansas, party of the first part, and Carlos S. Greeley and Adolphus Meier, of the city of St. Louis, parties of the second part, witnesseth:

That whereas the Union Pacific Railway Company, Eastern Division, pursuant to the terms of their charter, granted by the Governor and Legislative Assembly of the Territory of Kansas, in the United States of America, incorporating them, the amendments thereto by the State of Kansas, and the act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved 1st of July, 1862, and the several acts of Congress amendatory thereof, are engaged in constructing a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, and from Wyandotte, in the State of Kansas, to Fort Riley, in said State, and thence westwardly, and also a branch railway from the city of Leavenworth, in Kansas aforesaid, to its junction with the main line of the company's road east of Lawrence as now located, and for the purpose of constructing said railway, beginning as aforesaid on the south side of the Kansas river and at Wyandotte, and running thence westwardly on the north side of the Kansas river to such point west of the one hundredth meridian, to which the grant in bonds from the United States, by virtue of the several acts of Congress passed in aid of the company, extend, and also the said branch with appendages and appurtenances, have resolved to raise money by loan to an amount not exceeding ten thou-

13 sand dollars per mile, which is intended to be a lien upon the said railroad, the said branch, the telegraph line, and appurtenances, subject only to the following prior liens made and to be made, viz.:

Upon the first one hundred and forty miles of the said main line, beginning at the State line of Missouri and Kansas and extending thence westwardly to the one hundred and fortieth mile post (140th), a mortgage bearing date the first day of August, 1865, to John Edgar Thomson and Henry M. Alexander, trustees, to secure bonds amounting in the aggregate to the sum of two million two hundred and forty thousand dollars ($2,240,000), the lien of the United States of America to secure bonds issued and to be issued in pursuance of the acts of Congress hereinbefore mentioned at the rate of sixteen thousand dollars per mile upon the main line of railway extending from the State line and from Wyandotte westwardly, and upon the said branch railway a mortgage bearing date the first day of January, 1866, to John Edgar Thomson and Henry M. Alexander, trustees, to secure bonds amounting in the aggregate to the sum of six hundred thousand dollars ($600,000), and subsequent incumbrances to be created at the option of the company, as hereinafter provided, and which loan shall be evidenced by bonds of the denomination

of one thousand dollars ($1,000), two hundred and fifty dollars ($250), and one hundred dollars ($100) each, which said bonds are to be issued according to the exigency of the company, and only at the rate of ten thousand dollars per mile, as the said railroad shall be completed and opened to the public use, and made payable to the said Carlos S. Greeley and Adolphus Meier, trustee, or bearer, at the city of New York on the first day of July, one thousand nine hundred and sixteen, and bearing interest after five years from date at the rate of seven per cent. per annum, as the net earnings hereinafter defined of the said railway in each calendar year may suffice to pay, as hereinafter provided, such interest for each half calendar year upon the said bonds being payable on the first days
14 of March and September, according to the interest warrants thereto attached, and said bonds and interest are to be on an equality so far as regards security for the payment thereof by these presents:

Now, therefore, this indenture witnesseth that the said Union Pacific Railway Company, Eastern Division, in order to secure the payment of the said bonds hereinbefore described and the interest warrants thereto attached, and in consideration of one dollar paid on the sealing and delivery hereof by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, transferred, and conveyed, and by these presents do grant, bargain, sell, transfer, and convey, to the said parties of the second part, and to the survivors of them, and to their successor and his assigns forever, all the said railway and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, and from Wyandotte, in the State of Kansas, westwardly to such point west of the one hundredth meridian, to which the grant in bonds from the United States by virtue of the several acts of Congress passed in aid of said company extends, and all of said company's said branch road from Leavenworth to the junction near Lawrence, as aforesaid, with the road-bed, superstructure, and all rails and other materials used therein or procured therefor, and all machinery, locomotives, cars and rolling-stock, bridges, viaducts, culverts, fencing, depots, sidings and station grounds, telegraph poles, wire, instruments, and buildings erected thereon, and all rights therein, tolls and income, and any rights thereto or interest therein, together with the tolls or income to be had or levied therefrom, and all the franchises, rights, and privileges of the Union Pacific Railway Company, Eastern Division, of, in, to, and concerning the same, whether the same is at present possessed or may in the future be acquired by said party of the first part, subject, nevertheless, to the following prior liens created and to be created by the party of the first part, to wit:

15 First. The said mortgage of the party of the first part, bearing date August 1st, 1865, to J. Edgar Thomson and Henry M. Alexander, to secure the bonds of the company, amounting in the aggregate to the sum of two millions two hundred and forty thousand dollars ($2,240,000); also a further incumbrance or incumbrances of sixteen thousand dollars ($16,000) per mile to be created upon the

said railway and appurtenances west of the first one hundred and forty miles thereof to the point on the main line at which the Government subsidy of $16,000 per mile in bonds now by law extends.

Second. The lien of the United States of America to secure bonds or other liability of the company made or to be made in pursuance of acts of Congress, as hereinbefore mentioned, to aid in the construction of said road.

Third. And upon said branch railway a mortgage, bearing date 1st January, 1866, to John Edgar Thomson and Henry M. Alexander, trustees, to secure said bonds, amounting in the aggregate to the sum of six hundred thousand dollars ($600,000); and to enable the party of the first part to provide for the payment of the liabilities hereinbefore mentioned, and to provide means for the continuation and operation of its road, it is hereby expressly agreed that the company may from time to time make and perpetually maintain incumbrances upon said mortgaged property to the United States Government or others, or both, which may amount to thirty-two thousand dollars ($32,000) per mile of the road embraced in these presents, and such incumbrance or incumbrances shall be prior in lien to these presents and have priority and preference of payment over the bonds to be issued by the company and secured by these presents.

And it is further understood that this mortgage is not intended to and does not include any lands which have been or may be acquired by treaty, grant, or otherwise, except such as may be set apart for said road-bed, depot, grounds, station-houses, side tracks, telegraph lines, and buildings used in the working or man-
16 agement of said road and telegraph line; to have and to hold the said premises and every part thereof, with all the appurtenances, subject to the conditions herein expressed, unto the said parties of the second part as joint tenants, and not as tenants in common, and the survivor of them and their successors, and their and his assigns, forever for the purposes herein expressed.

ARTICLE 1. Until default shall be made in respect to something herein required to be done or kept by the Union Pacific Railway Company, Eastern Division, the said Union Pacific Railway Company, Eastern Division, shall be suffered and permitted to possess, manage, operate, and enjoy the said railway, with its equipments and appurtenances, and to take and use the rents, income, profits, tolls, and issues thereof in the same manner and with the same effect as if this deed had not been made.

ARTICLE 2. In case default shall be made in the application to the payment of interest upon the aforesaid bonds at the time and in the manner in article four of these presents prescribed, after satisfying prior liens and conditions as therein provided, of the net earnings of the said railway for any half calendar year, as such net earnings are defined in the said article four, and if such default shall continue for the period of twelve months, then and in that case, upon the requisition of the bondholders secured hereby, specified in the said article four, it shall be lawful for the said trustees or the survivor of them, or their or his successors, personally or by their or

his attorneys or agents, to enter into and upon all and singular the premises hereby conveyed or intended so to be and each and every part thereof; to have, hold, and use the same, operating by their or his superintendents, managers, receivers, or servants or other attorneys or agents — the said railway, and conducting the business thereof and making from time to time all repairs and replacements and such useful alterations, additions, and improvements thereto as may seem to them or him to be judicious, and to collect and receive all tolls,
17 freights, income, rents, issues, and profits of the same and of every part thereof; and after deducting the expenses of operating the said railway and conducting its business, and of all the said repairs, replacements, alterations, additions, and improvements, and all payments which may be made for taxes, assessments, charges, or liens prior to the lien of these presents upon the said premises, or any part thereof, as well as a just compensation for their own or his services, to apply the moneys arising as aforesaid to the payment of interest in the order in which such interest shall have become or shall become due ratably to the persons holding the interest warrants entitled to such interest; and after paying all interest which shall then be payable, as hereinabove provided, to return any balance which may remain in the possession of said trustees to the party of the first part, and they shall at the same time abandon and surrender to the said party the possession and control of all the said trust property held by them by virtue of these presents.

ARTICLE 3. If the said Union Pacific Railway Company, Eastern Division, shall well and truly pay the sums of money herein required to be paid by the said company, and all interests thereon, at the times and in the manner herein specified, and shall well and truly keep and perform all the things herein required to be kept or performed by the said company according to the true intent and meaning of these presents, then and in that case the estate, right, title, and interest of the said parties of the second part, and of their successors in the trust hereby created, shall cease, determine, and become void; otherwise the same shall be and remain in full force and virtue.

ARTICLE 4. It is hereby declared and agreed that the words net earnings, as used in these presents, shall be construed to mean such surplus of the earnings of the said railway as shall remain after paying all expenses of operating the said railway and carrying on its business, including all taxes and assessments and pay-
18 ments on incumbrances prior in lien, or that may hereafter be prior in lien, to these presents upon specific portions of the property hereby conveyed, of completing, repairing, or replacing the said railway, its appurtenances, and equipments, so that the same shall be in good condition, and of providing such additional equipment as the said company shall deem necessary for the business of the said railway.

And it is further declared and agreed that the default contemplated in article two of these presents shall consist in the omission to apply the aforesaid net earnings for any calendar year, after satisfying the payments for interest and principal when due upon the

aforesaid mortgages made and incumbrances authorized to be created upon the said railway, and the incumbrance and lien which the United States has, by virtue of any said act of Congress affecting the aforesaid mortgaged property, it being expressly understood and agreed that the incumbrance hereby created shall be strictly subordinate to the said mortgage or mortgages of the party of the first part made and herein authorized to be made over the whole line of its road conveyed by these presents, and of the lien of the United States for repayment of principal and interest for its bonds advanced or to be advanced to the company by virtue of said acts of Congress aforesaid, and the sinking funds by said acts of Congress required to be created, and any and all the rights of the United States against said railway company, and the duties and obligations of the company to the United States mentioned in these presents, and of all the liens and incumbrances which by acts of Congress passed in aid of the construction of the Union Pacific railroad, or of this company, may be lawfully created prior in lien to that of the United States.

The application of "net earnings" to the payment of interest shall be made on the first days of January and July of each year, and shall be paid on the first days of March and September next following.

19 And it is further declared and agreed that in case there shall be net earnings of the said railway, and it shall so appear that the same are not sufficient to pay the said interest warrants as they respectively fall due, then said net earnings shall remain in the treasury of the company and be added to the net earnings, as herein defined, of each succeeding half calendar year until the accumulated net earnings shall amount to a sum sufficient to pay one set of overdue coupons in the order of their maturing in point of time, and if it shall so happen that the said net earnings shall not be sufficient to pay all said interest warrants, and there shall remain any portion of them unpaid when the principal sum secured by the bonds issued under this deed of trust shall become due, the said unpaid interest shall be added to the principal, and with it be paid to the holder by the said party of the first part.

And it is further agreed that in case there are net earnings whereby the payments of coupons shall become payable as herein defined the company may elect to pay such coupon to the holder thereof at the appraised and current rates of selling by the company the lands acquired and owned by said company by virtue of the acts of Congress passed or to be passed in aid of construction of said road, but the said railway company shall not have the power of paying any cash dividend on its stock until it shall have resumed the payment in cash of the interest on the bonds secured by these presents.

And it is further agreed and declared that the requisition which shall be necessary to authorize or require the trustees to exercise the power of entry heretofore granted shall be in writing and signed by the holders in interest of bonds to the amount of at least one hundred thousand dollars ($100,000) over and above bondholders who may object in writing to such entry.

ARTICLE 5. It is mutually agreed by and between the parties
20 hereto that the word "trustees," as used in these presents, shall be construed to mean the trustees for the time being, whether one or both be original or not, and whenever a vacancy shall exist to mean the surviving or continuing trustee, and such trustee shall, during such vacancy, be competent to exercise all the powers granted by these presents to the parties of the second part, and it is mutually agreed by and between the parties hereto that neither of the said trustees shall be in any manner responsible for any default or misconduct of his cotrustee; that the trustees shall be entitled to just compensation for all services which they may hereafter render in their trust, to be paid by the said company; that either of the said trustees or any successor may resign and discharge himself of the trust created by these presents by notice in writing to the Union Pacific Railway Company, Eastern Division, and to the existing trustee, if there be such, three months before such resignation shall take effect, or such shorter time as they may accept as adequate notice, and upon the due execution of the conveyances hereinafter required that the trustees, or either of them, may be removed by the vote of a majority in interest of the holders of the aforesaid bonds, the said vote being had at a meeting held of the said bondholders, and attested by an instrument under the hands and seals of the persons so voting, that in case at any time hereafter either of the said trustees, or any trustee hereafter appointed, shall die or resign or be removed, as herein provided, or by a court of competent jurisdiction, or shall become incapable or unfit to act in said trust, a successor to such trustee shall be appointed by the surviving or continuing trustee, with the consent of the holders for the time being of a majority in interest of said bonds then outstanding, or the consent of a meeting duly held of the holders of said bonds, and the trustee so appointed, with the trustee so surviving or continuing, shall thereupon be-
21 come vested with all the powers, authorities, and estates granted to or conferred upon the parties of the second part by these presents, and all the rights and interests required to enable him to execute the purposes of this trust, without any further assurance or conveyance, so far as such effect may be lawful; but the surviving or continuing trustee shall immediately execute all such conveyance and other instruments as may be fit or expedient for the purpose of assuring the legal estate in the premises, jointly with himself, to the trustee so appointed; and upon the death, resignation, or removal of any trustee, or any appointment in his place in pursuance of these presents, all his powers and authorities by virtue hereof shall cease, and all the estate, right, title, and interest in the said premises of any trustee so dying, resigning, or being removed shall, if there be a cotrustee surviving or continuing in office, wholly cease and determine; but the said trustee so resigning or being removed shall, on the written request of the new trustee who may be appointed, immediately execute a deed or deeds of conveyance to vest in such new trustee, jointly with the continuing trustee, and upon the trustee and upon the trusts herein expressed all the property, rights, and franchises which may be at that time held upon

the said trusts, provided, nevertheless, that it is hereby agreed and declared that, for the first vacancy in the trusts hereby created, which may happen as hereinbefore provided, in respect to either of the parties of the second part hereto, Benjamin W. Lewis, of Saint Louis, is hereby designated and appointed to fill such vacancy with the same effect as if he had been appointed in the manner hereinbefore specified, and in case it shall at any time hereafter prove impracticable, after reasonable exertions, to appoint in the manner hereinbefore provided a successor in any vacancy which may have happened in said trust, or in case the trust shall become wholly vacant, application in behalf of all the holders of the bonds secured hereby may be made by the surviving or continuing trustee,
22 or, if the trust be wholly vacant, by holders of the said bonds, to the aggregate amount of one hundred thousand dollars ($100,000), to any circuit court of the United States for any judicial district in which any part of the aforesaid railway may be situate for the appointment of a new trustee or new trustees.

In witness whereof the parties of the first part have hereunto set their respective hands and seals and the parties of the second part have also set their respective hands and seals for the purpose of evidencing their acceptance of the trust hereby created on the day and year first hereinbefore written.

The party of the first —, by its president and secretary, at Wyandotte, Kansas, has affixed its corporate seal hereto and attested the execution of these presents.

[SEAL.] JOHN D. PERRY, *President.*

Attest: CHAS. B. LAMBORN, *Secretary.*

ADOLPHUS MEIER. [SEAL.]
CARLOS S. GREELEY. [SEAL.]

Subscribed, sealed, and delivered in presence of—
S. T. SMITH.
T. F. OAKES.

STATE OF MISSOURI, } ss:
City and County of St. Louis, }

On this nineteenth day of January, A. D. 1867, before me, the undersigned, Francis W. Rawle, a commissioner for the State of Kansas, resident in the city of St. Louis aforesaid, duly commissioned and qualified by the executive authority, and under the laws of said State of Kansas, to take acknowledgments, &c., came John D. Perry, president of the Union Pacific Railway Company, Eastern Division, personally known to me as being the identical person whose name is affixed to the foregoing deed as president of said railway company, and in behalf of said railway company, and acknowledged the same to be his own voluntary act and deed, and that he
23 voluntarily affixed thereto the corporate seal of said company and caused the same to be attested by the secretary of said company, and that said deed was so executed by order of the board of directors of said company. And also at the same time

personally appeared before me, commissioner as aforesaid, Adolphus Meier and Carlos S. Greeley, residents of said city of St. Louis, and known by me to be the identical persons named in the foregoing instrument, and acknowledged, severally, that they signed and sealed the same for the purpose of indicating their acceptance of the trust therein created.

In testimony whereof I hereto set my hand and affix my official seal at St. Louis city, State of Missouri, this nineteenth day of January, A. D. 1867.

[SEAL.] FRANCIS W. RAWLE,
Commissioner for Kansas, in Missouri.

STATE OF KANSAS, } ss:
County of Wyandotte, }

I, the undersigned, register of deeds in and for the county of Wyandotte aforesaid, do hereby certify that the annexed instrument of writing (U. P. R. W. Co. to C. S. Greeley *et al.*) was received in my office and filed for record this day at 10 o'clock a. m., and is duly recorded in record B, on pages 407, 408, 409, 410, 411, 412, 413, 414, and 415.

In testimony whereof I have hereunto set my hand and affixed my seal of office at Wyandotte city, in said county, this 28th day of January, A. D. 1867.

[SEAL.] JAMES A. CRUISE,
Register of Deeds.

Fees, $5.00, paid by Jno. P. Devereaux.

STATE OF KANSAS, } ss:
City and County of Leavenworth, }

OFFICE OF REGISTER OF DEEDS.

I, Henry C. Keller, register of deeds within and for the county aforesaid, do hereby certify that the within and foregoing in-
24 strument of writing was received by me for record this 16th day of February, A. D. 1867, at 4 o'clock p. m., and that the same is duly recorded in book 14 for recording morgages, at pages 369, 370, 371, 372, 374, 375, and 376.

In testimony whereof I have hereunto set my hand and official seal the day and year aforesaid.

[SEAL.] H. C. KELLER,
Register of Deeds.

Fees, $6.00, paid by John P. Devereux.

STATE OF KANSAS, } ss:
Douglas County, }

OFFICE OF REGISTER OF DEEDS.

Received the within instrument for record March 11th, 1867, at 4 o'clock p. m., and recorded in book F of mortgages, pages 545, 546, 547, 548, 549, 550, and 551, &c.

Witness my hand and official seal the day and year above written.

[SEAL.] S. S. HORTON,
Register of Deeds.

Fees, $5.00, paid by Jno. P. Devereux.

STATE OF KANSAS, } ss:
Jefferson County, }

I, Lewis J. Trower, register of deeds within the county aforesaid, do hereby certify that the within and foregoing instrument of writing was received by me for record this 18th day of March, A. D. 1867, at 11½ o'clock a. m., and that the same is duly recorded in book I of deeds, at pages 1, 2, 3, 4, 5, 6, 7, 8.

In testimony whereof I have hereunto set my hand and official seal the day and year aforesaid.

[SEAL.] L. J. TROWER,
Register of Deeds.

Fees, $5.00, paid by Jno. P. Devereux.

STATE OF KANSAS, } ss:
Shawnee County, }

I, William P. Thompson, register of deeds within the county aforesaid, do hereby certify that the within and foregoing instrument of writing was received by me for record this 28th day of March, A. D. 1867, at 2 o'clock p. m., and that the same is duly recorded
25 in Vol. II, pages 537, 538, 539, 540, 541, 542, 543, 544, 545, and 546.

In testimony whereof I have hereunto set my hand and official seal the day and year aforesaid.

[SEAL.] WILLIAM P. THOMPSON,
Register of Deeds, Shawnee Co., K's,
By G. B. HOLMES, *Deputy.*

Fees, paid by Jno. P. Devereux, $6.00.

STATE OF KANSAS, } ss:
Jackson County, }

This instrument was received by me for record this 8th day of April, A. D. 1867, at 8 o'clock a. m., and duly recorded in book B of mortgages, on pages 478, 479, 480, 481, 482, and 483.

Witness my hand and official seal the day and year above written.

[SEAL.] GEO. L. HAMM,
Register of Deeds.

Fees, $6.00, paid by Jno. P. Devereux.

STATE OF KANSAS, } ss:
Pottawatomie County, }

This instrument was filed for record on the 22nd day of April 1867, at 8 o'clock a. m., and duly recorded in book D of mortgages, at pages 126, 127, 128, 129, 130, 131, 132, and 133.

Witness my hand and official seal the day and year last above written.

[SEAL.] A. P. SMITH,
Register of Deeds.

Fees, $6.00, paid by Devereux.

STATE OF KANSAS, } ss:
Riley County, }

This instrument was received at this office for record May 13th, A. D. 1867, at 3 o'clock p. m., and duly recorded in book A of mortgages, at pages 422, 423, 424, 425, 426, and 427.

Witness my hand and official seal this 13th day of May, A. D. 1867.

[SEAL.] S. G. HOYT,
Register of Deeds.

Fees, $6.00, paid by J. P. Devereux.

STATE OF KANSAS, } ss:
Davis County, }

The within instrument was received in my office for record this 22nd day of May, A. D. 1867, at 10 o'clock a. m., and duly
26 recorded in book A of mortgages, on pages 64, 65, 66, 67, 68, and 69.

Witness my hand and official seal the day and year last written.

[SEAL.] DANIEL MITCHELL,
Register of Deeds.

Fees, $6.00, paid by J. P. Devereux.

STATE OF KANSAS, } ss:
Dickinson County, }

This written instrument was received in my office for record this 28th day of June, 1867, at 6 o'clock p. m., and duly recorded in book A of conveyances, on pages 394, 395, 396, 397, 398, 399, and 400.

Witness my hand and official seal the day and year last written.

[SEAL.] E. W. BRADFIELD,
Register of Deeds,
By W. S. MOON, *Deputy.*

Fees, $6.00, paid by J. P. Devereux.

STATE OF KANSAS, } ss:
County of Saline, }

This instrument of writing was filed for record on the 11th day of July, A. D. 1867, at 2 o'clock p. m., and duly recorded in book B of mortgages, at pages 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93.

[SEAL.] E. BAXTER,
Register of Deeds.

Fees, $6.00, paid by Devereux.

27 Whereas the undersigned did, on the 27th day of June, 1878, formally resign his position as trustee in the foregoing mortgage, being income mortgage of the Union Pacific Railway Company, Eastern Division, dated July 1st, 1866; and whereas, by the terms of said mortgage, Benjamin W. Lewis is designated and

appointed to be the successor of any trustee named in said mortgage so resigning:

Now, in order to vest the said Benjamin W. Lewis with all the estate, rights, powers, and duties which devolved or were imposed on the undersigned by reason of said mortgage, I, the said Carlos S. Greeley, trustee in the said mortgage mentioned, do hereby release, assign, and set over to the said Benjamin W. Lewis, for and in consideration of the premises, all the estate, right, title, and interest vested in me as such trustee, to be held by him, said Lewis, as my successor in said trust as fully and to the same extent and for the same purposes that said estate and trust were held by me.

CARLOS S. GREELEY.

STATE OF MISSOURI, } ss:
City and County of St. Louis, }

Be it remembered that on this twenty-seventh day of June, A. D. eighteen hundred & seventy-eight, at three o'clock in the afternoon, before me, a notary public, personally came Carlos S. Greeley, personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing, and acknowledged the execution of the same as his act and deed for the purposes therein set forth.

In testimony whereof witness my hand and official seal the day and year first above written.

[L. S.]

A. H. CALIF,
Notary Public.

28 Whereas the undersigned did, on the 27th day of June, 1878, formally resign his position as trustee in the foregoing mortgage, being income mortgage of the Union Pacific Railway Company, Eastern Division, dated July 1st, 1866;

And whereas by the terms of said mortgage Benjamin W. Lewis is designated and appointed to be the successor of any trustee named in said mortgage so resigning: Now, in order to vest the said Benjamin W. Lewis with all the estate, rights, powers, and duties which devolved or were imposed on the undersigned by reason of said mortgage, I, the said Adolphus Meier, trustee in the said mortgage mentioned, do hereby release, assign, and set over to the said Benjamin W. Lewis, for and in consideration of the premises, all the estate, right, title, and interest vested in me as such trustee, to be held by him, said Lewis, as my successor in said trust, as fully and to the same extent and for the same purposes that said estate and trust *was* held by me.

ADOLPHUS MEIER.

STATE OF MISSOURI, } ss:
City and County of St. Louis, }

Be it remembered that on this twenty-seventh day of June, A. D. eighteen hundred and seventy-eight, at half-past twelve o'clock at noon, before me, the undersigned, a notary public, personally appeared Adolphus Meier, who is personally known to me to be the same person

whose name is subscribed to the foregoing instrument of writing, and acknowledged the execution of the same as his act and deed, for the purpose therein set forth.

In testimony whereof witness my hand and official seal, at St. Louis city, the day and year first above written.

[L. S.] A. H. CALEF,
Notary Public.

Qualified Nov. 1, '75.
Commis. expires Nov. 1, '79.

29 EXHIBIT "C."

Recapitulation of the Earnings of the Kansas Pacific Railway.

Gross earnings of the entire road for the years 1871 to 1877, both inclusive	$23,146,562
Gross earnings of the 1st and 2nd Divisions for same period, being $\frac{5}{7}$ths of the whole, as per receiver's report	$16,698,259
Operating expenses (as shown by receiver's report) of 1st & 2nd Divisions, *to have been* 55$\frac{4}{5}$ths per cent	9,390,562
Net earnings of said 1st & 2nd Divisions, being 44$\frac{1}{5}$ per cent. of said earnings, as shown by receiver's report	$7,307,697

30 Net earnings of the First and Second Divisions:

1871	1,045.808	
1872	1,175,629	
1873	1,124,984	
1874	1,059,773	
1875	1,061,987	to Nov. 21st.
1876	947,395	" " 21st.
1877	981,368	
	7,396,944	
Deduct 1st mortgage int. charges	2,647,260	
Balance to credit of unstamped income	4,749,684	

Statement of earnings for 1871:

Gross earnings for entire road	$3,312,517
Gross earnings of 1st & 2nd Divisions, being $\frac{5}{7}$ths of the whole, as per rates in receiver's report for 1877	2,366,083
Net earnings of 1st & 2nd Divisions, being 44$\frac{1}{5}$ per cent. of above sum, as per percentage shown in receiver's report	$1,045,808
Interest charges on first mortgages	378,180
Net	$667,628

31 Statement of earnings for 1872:

Gross earnings for entire road	$3,723,713
Gross earnings of 1st & 2nd Divisions, being more than $\frac{5}{7}$ths of the whole, as per receiver's report, calculated at $\frac{5}{7}$ths	2,659,795
Net earnings, after deducting taxes of 1st & 2nd Divisions, being 44$\frac{1}{5}$ % of above sum, as p'r percentage shown in receiver's report	$1,175,629
Interest charges on first mortgage	378,186
Balance to credit of unstamped income	$797,449
Interest charges on Gov't lien	378,180
Net balance to credit the income	$419,269
Interest charges on entire income issue	256,600
Balance	$162,669

32 Statement of earnings for 1873:

Gross earnings for entire road	$3,563,299
Gross earnings for 1st & 2nd Divisions, being $\frac{5}{7}$ths of the whole, as per receiver's report	2,545,214
Net earnings, after deducting taxes of 1st & 2nd Divisions, being 44$\frac{1}{5}$ths % of above sum, as per percentage shown in receiver's report	$1,124,984
Interest charges on first mortgage	378,180
	$746,804

Statement of earnings for 1874:

Gross earnings for entire road	$3,356,749	
Gross earnings for 1st & 2nd Division-, being more than $\frac{5}{7}$ths of the whole, as per receiver's report, calculated at $\frac{5}{7}$	2,397,678	
Net earnings, after deducting taxes of 1st & 2nd Divisions, being 44$\frac{1}{5}$ths % of above sum, as per percentage shown in receiver's report	$1,059,773	
Interest charges on first mortgages	378,180	
	$681,593	00
Less taxes	37,201	76
	$644,391	24

33 Statement of earnings for 1875:

Gross earnings for entire year	$3,363,760	
Gross earnings of 1st & 2nd Divisions, being more than $\frac{5}{7}$ths of the whole, as per receiver's report, calculated at $\frac{5}{7}$ths	2,402,686	
Net earnings after deducting taxes of 1st & 2nd Divisions, being $44\frac{1}{5}$ per cent. of above sum, as per percentage shown in receiver's report	$1,061,987	
Interest charge on first mortgage	378,180	
	$683,807	
Less taxes	172,366	41
	$511,440	59

Statement of earnings for 1876 to Nov. 21:

Gross earnings for entire road	$3,000,800	
Gross earnings of 1st & 2nd Divisions, being $\frac{5}{7}$ths of the whole, as per receiver's report	2,143,429	
Net earnings of 1st & 2nd Divisions, being $44\frac{1}{5}$ths % of above sum, as per percentage shown in receiver's receiver's report	$947,395	
Interest charges of first mortgage	378,180	
	$569,115	

34 Statement of earnings for 1877:

Gross earnings for period from November 21st, 1876, to November 21st, 1877, without Government business	$2,825,724	
Gross earnings of 1st & 2nd Divisions, being more than $\frac{5}{7}$ths of the whole, as per receiver's report, calculated at $\frac{5}{7}$ths	2,018,374	
Net earnings of 1st & 2nd Divisions, being $44\frac{1}{5}$ths % of above sum, as per percentage shown in receiver's report	$892,121	
Interest charges on first mortgage	378,180	
Balance to credit of unstamped incomes	$513,941	

35 *Construction and Equipment as per Directors' Report.*

On entire road.		On Eastern Division, p'r milage.
1871	$506,526	
1872	139,204	
1873	68,123	
1874	4,698	
1875	7,704	
	$726,255	$450,278.10.
Taxes.		
1871	67,029 39	Total expenditures on account of construction and equipment, taxes and insurance, of the Eastern Division, $849,798.28.
1872	165,402 65	
1873	105,767 41	
1874	37,201 00	
1875	172,366 41	
	547,766 86	$339,614.92.
Insurance.		
1871	2,306 14	
1872	29,164 29	
1873	21,659 02	
1874	23,557 05	
1875	19,935 94	
	96,623 42	$59,905.26.

Classes of bonds.	Date of issue.	Int. Rate.	Int. Pay—	Principal payable—	Amount of bonds. Authorized.	Amount of bonds. Existing.	Annual interest.
1st mort. (E. Div., 140 M.), gold	Aug. 15, '65	6%	F. & A.	Aug. 1, '95	2,240,000	2,240,000	134,400
" (Mid. Div. *Div.*, 250 M.), gold	June 1, '66	6 "	J. & D.	June 1, '96	4,063,000	4,063,000	243,780
" mort. (Den. Div., 245 M.), gold	June 20, '69	7 "	M. & N.	May 1, '99	6,500,000	6,395,000	447,650
" mort., land grant currency	M'ch 1, '66	7 "	M. & S.	M. 1, '76, '76	500,000	66,600	4,620
1st land grant mort'g, gold	July 1, '70	7 "	J. & J.	July 1, '80	2,000,000	1,690,250	118,317
2d " " " "	Aug. 23, '71	7 "	M. & S.	Sep. 1, '86	1,500,000	1,500,000	105,000
Leaven. Br., 1st mort., currency	Jan'y 1, '66	7 "	M. & N.	May 1, '96	600,000	600,000	42,000
Income mort., currency	July 1, '66	7 "	M. & S.	July 1, '16	4,275,350	4,275,350	299,275
Funding " "	Oct. 2, '76	10 "	A. & O.	Oct. 1, '79	1,500,000	1,500,000	150,000
Total amount of bonds and annual interest					23,178,350	22,329,600	1,545,042

37 *Kansas Pacific Railroad Expenses.*

Department.	1870.	1871.	1872.	1873.	1874.	1875.	1876.
Conducting transport'n	653,586 04	625,209 68	615,865 64	559,426 62	456,214 48	497,822 70	468,265 22
Motive power	875,765 65	720,361 99	719,534 66	665,684 26	512,638 59	525,454 59	} 691,112 95
Maintainance of cars	220,752 03	200,545 06	176,322 70	193,046 41	141,871 90	159,302 42	
Maintainance of way	592,526 72	601,979 45	604,261 83	596,634 79	419,182 05	483,480 43	426,326 17
General expense	137,410 02	153,493 78	113,280 94	102,198 51	141,138 52	124,819 95	134,628 97
	2,480,040 46	2,302,589 96	2,229,265 77	2,116,990 59	1,671,045 57	1,790,879 95	1,720,333 31

38 The annual report of the directors of the Kansas Pacific Railway Company *are* hereby referred to as a part of this exhibit.

Endorsed: No. 4407. Benjamin W. Lewis *vs.* Adolphus Meier *et al.* Filed June 29, 1879. B. D. Palmer, cl'k. J. W. Green, att'y.

39 And on the same day, June 29th, A. D. 1878, in the office of the clerk of said court was filed the answer of the defendant, The Kansas Pacific Railway Company, and is as follows, to wit:

Answer of Defendant, Kansas Pacific Railway Company.

STATE OF KANSAS, *Douglas County,* } *ss:*

In the District Court Sitting in Said County.

B. W. LEWIS, Plaintiff,
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, and THE KANSAS PACIFIC RAILWAY COMPANY, Defendants.

1. The defendant admits that it is a corporation, as alleged.
2. The defendant denies each and every other allegation in the petition contained, and especially it denies that there have ever been any net earnings applicable to the payment of the income bonds in the petition mentioned.

Wherefore defendant asks judgment for costs.

CHAS. MONROE,
Att'y for Defendant, Kansas Pacific Railway Company.

Indorsed: 4407. B. W. Lewis *vs.* Adolphus Meier, Carlos S. Greeley, & The Kansas Pacific Railway Company. Answer of defendant, Kansas Pacific Railway Company. Filed June 29th, 1878. B. D. Palmer. Chas. Monroe, att'y for said def't.

And also, on the 29th day of June, A. D. 1878, in the office of the clerk of said court was filed the answer of the defendants Meier and Greeley, and is in words and figures as follows, to wit:

40 *The Answer of the Defendants Meier and Greeley.*

STATE OF KANSAS, *Douglas County,* } *ss:*

In the District Court for the Fourth Judicial District, Sitting in Said County.

BENJAMIN W. LEWIS, Plaintiff,
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, and THE KANSAS PACIFIC RAILWAY COMPANY, Defendants.

1. These defendants admit the execution of the income mortgage

in the petition mentioned and that the same was executed to them as trustees, but they say they have, [with] said Meyer, first renounced and resigned their positions as trustees under said mortgage and have assigned and set over to said Lewis, plaintiff, named in said mortgage [with] said Meier, first all their right, title, and interest in and to the mortgaged property, which assignments they admit are correctly set forth in Exhibit B to the petition.

They, further answering, say that on the twentieth day of June, A. D. 1869, they executed an instrument of writing, of which the annexed, marked A, is a copy, and that there had been stamped at that date upon all the said income bonds except two hundred and forty-one thousand dollars thereof, as they were informed and believed at the time, a statement copy herewith—Exhibit B. The effect of said instrument A and stamping C these defendants do not undertake to declare, but leave the same to the judgment of the court; and they pray to be dismissed with their costs.

J. P. USHER,
Attorney for Defend'ts Meier & Greeley.

41 EXHIBIT "A."

An indenture made the twentieth day of June, one thousand eight hundred and sixty-nine, between Carlos S. Greeley and Adolphus Meier, trustees, under a certain mortgage or deed of trust bearing date July first, eighteen hundred [and] sixty-six, made to them by [the] Union Pacific Railway Company, Eastern Division, parties of the first part, and John Edgar Thompson, Adolphus Meier, and John A. Stewart, trustees, under a certain mortgage or deed of trust bearing even date herewith made to them by the Kansas Pacific Railway Company, parties of the second part.

Whereas the said Union Pacific Railway Company, Eastern Division, heretofore made and executed its certain mortgage or deed of trust bearing date July first, eighteen hundred and sixty-six, to the said Carlos S. Greeley and Adolphus Meier, trustees, upon the railroad and telegraph line of said company from the Missouri river, at the mouth of the Kansas river, and from Wyandotte westwardly to the point west of the one hundredth meridian, to which the grant of United States bonds in aid of said company extends, which point has upon subsequent survey been ascertained to be at the three hundred and ninety-fourth mile post west of the Missouri river and the branch road from Leavenworth to the junction near Lawrence, with the appurtenances and equipments thereof, to secure the payments of the income bonds issued and to be issued by said company to an extent not exceeding ten thousand dollars per mile of its said road and the application of the net earnings of the said road as therein defined, after providing for expenses and charges and prior incumbrances, to the payment of interest accruing upon such income bonds in the manner and subject to the conditions in said mortgage specified;

And whereas the name of the said Union Pacific Railway Com-

pany, Eastern Division, was subsequently duly changed to the Kansas Pacific Railway Company;

42 And whereas the said Kansas Pacific Railway Company is now engaged in the construction of an extension of its said railroad and telegraph line from the before-mentioned three hundred and ninety-fourth mile post to Denver, in the Territory of Colorado, a distance of two hundred and thirty-six miles or thereabouts, and, with the object of raising funds therefor, has executed and delivered its certain mortgage or deed of trust, bearing even date herewith, to the said John Edgar Thompson, Adolphus Meier, and John A. Stewart, as trustees, covering as well the railroad premises, properties, rights, and franchises which are embraced in and covered by the above-mentioned mortgage given to the parties of the first part as trustees for the security of the said income bonds as the said line of road now being constructed as aforesaid from the three hundred and ninety-fourth mile post to Denver, and certain lands granted by the United States in aid thereof, to secure the payments of bonds issued or to be issued by the said The Kansas Pacific Railway Company to the extent of six million five hundred thousand dollars, payable May first, eighteen hundred and ninety-nine, with interest in the meantime at the rate of seven per cent. per annum, payable half-yearly, interest and principal being payable in gold, which bonds are at a rate not exceeding thirty-two thousand dollars per mile of such extension.

And whereas, in the opinion of the board of directors of the said The Kansas Pacific Railway Company, it is necessary, in order that said company may be able to negotiate its bonds so secured by said mortgage to the parties of the second part, and necessary in order to enable it to raise the means for the extension of its road to Denver, that the lien of the said mortgage so made and executed to the parties of the first part and of the income bonds thereby secured shall be subordinated as hereinafter expressed and

43 declared to the above-mentioned mortgage of even date herewith made to the said parties of the second part and to the lien and security of the said bonds for six millions five hundred thousand dollars issued and to be issued thereunder.

And whereas the holders of all the said income bonds issued under or secured by the above-mentioned mortgage to the parties of the first part, excepting such bonds to the amount of two hundred and forty-one thousand dollars, deeming it to their interest that the lien held for their benefit under said income-bond mortgage should be so subordinated to the end of furthering the extension of the said road to Denver as aforesaid, have in writing authorized the said lien, held for their benefit under the said mortgage to the parties of the first part, as trustees, to be subordinated in the manner and to the extent hereinafter expressed to the lien of the said mortgage of even date herewith made to the said parties of the second part and to the said six million five hundred thousand dollars issued or to be issued thereunder, and there has been accordingly stamped upon each and all of said income bonds, excepting those to said amount of two

hundred and forty thousand dollars, a declaration of their being so subordinated:

Now this indenture witnesseth that the said parties of the first part, as trustees aforesaid under the above-mentioned mortgage of July first, eighteen hundred and sixty-six, made to them for the security of said income bonds and for and on behalf of the holders of all the outstanding income bonds secured by said mortgage, in consideration of the premises and of one dollar to them in hand paid by the parties of the second part at and before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, and for other good and valuable consideration have covenanted, granted, and agreed, and do hereby covenant, grant, and agree to [and] with the said parties of the second part as trustees under the above-mentioned
44 mortgage or deed of trust of even date herewith made to them by the Kansas Pacific Railway Company, and for and on behalf of all persons who shall be or become holders of any of the said bonds within the amount of six million five hundred thousand dollars, issued under or secured by the same, that all the rights, liens, and claims of the said parties of the first part as trustees as aforesaid and their successors, and all the right. liens, and claims of the holders of the said income bonds under [and] by virtue of the above-mentioned mortgage or deed of trust of July first, eighteen hundred and sixty-six, made to the parties of the first part by the Union Pacific Railway Company, Eastern Division, of. in, to, upon, or in respect of all and singular the railroad and appurtenances, rights and privileges, properties, rights, interests, and franchises mentioned in or covered by the said mortgage or deed of trust of July first, eighteen hundred and sixty-six, shall be and are hereby subordinated and made subsequent and subject to the lien and claim thereon of the said mortgage or deed of trust of even date herewith made by the Kansas Pacific Railway Company to the parties of the second part as trustees as aforesaid, and to the rights, liens, and claims thereon of the persons who shall become holders of the said bonds within the amount of six million five hundred thousand dollars issued thereunder, and that the said mortgage or deed of trust to the parties of the first part of even date herewith and the said bonds within the amount of six million five hundred thousand dollars issued thereunder shall have preference and priority of lien over the said mortgage of July first, eighteen hundred and sixty-six, and over the lien of said income-bond holders upon all that is covered thereby as fully and completely as if it had been actually and regularly made and recorded, and the said bonds for six million five hundred thousand dollars issued thereunder before the making of said mortgage
45 or deed of trust of July first, eighteen hundred and sixty-six, saving and excepting, nevertheless, the rights, if any, of the holders of the said outstanding income bonds, *or either* the amount of two hundred and forty-one thousand dollars, who have not expressly assented to such subordination.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

CARLOS S. GREELEY. [SEAL.]
ADOLPHUS MEIER. [SEAL.]

THE STATE OF MISSOURI, } ss:
City and County of St. Louis, }

On the twentieth day of January, A. D. one thousand eight hundred and sixty-nine, before me, the undersigned, T. F. Oakes, commissioner, resident in the city of St. Louis, duly commissioned and qualified under the laws of the State of Kansas to take acknowledgments of deeds and other instruments, personally came Carlos S. Greeley and Adolphus Meier, personally known to me to be the same persons who executed the foregoing instrument and acknowledged the execution of the same.

[SEAL.] T. F. OAKES,
Com'r for Kansas.

Recorded in Jackson Co., Kansas.
Recorded in Leavenworth Co., Kansas.
Recorded in Jefferson Co., Kansas.
Recorded in Pottawatomie Co., Kansas.
Recorded in Wyandotte Co., Kansas.
Recorded in Dickinson Co., Kansas.
Recorded in Saline Co., Kansas.
Recorded in Davis Co., Kansas.
Recorded in Ellsworth Co., Kansas.
Recorded in Riley Co., Kansas.
Recorded in Douglas Co., Kansas.
Recorded in Shawnee Co., Kansas.

46 EXHIBIT "B."

The lien securing this bond has been, by the consent of the holder hereof, subordinated to a mortgage for $6,500,000, dated June, 1869, executed by the Kansas Pacific Railway Co. to provide for extending the road to Denver, and the interest on such $6,500,000 is made chargeable against net earnings before their application to payment of interest on this bond.

Also on the 29th day of June, at the April term of said court, A. D. 1878, among others, the following proceedings were had, to wit:

Order Appointing W. J. Patterson Referee.

BENJAMIN W. LEWIS
vs.
ADOLPHUS MEIER, C. S. GREELEY, and THE KAS. PAC. RA'Y CO. } 4407.

And now on this day comes the said pl'ff, Benj. W. Lewis, by J. W. Greene, his att'y, and come the defendants, Adolphus Meier and Carlos S. Greeley, by J. P. Usher, their att'y, and the def't, Kans. Pacific Railway Company, by Chas. Monroe, its att'y; and issue

having heretofore joined herein, plaintiff moves the court for the appointment of a referee in this cause, and it appearing to the court that this is a cause involving an examination of accounts, and all the defendants appearing and consenting, it is hereby ordered that W. J. Patterson be appointed referee in this cause to make and state an account as in the petition prayed; that in addition to the usual powers given to referees by statute he have power to compel the production of the books of the defendant railway company for the purposes of examination, and that he make a report to the court with all convenient speed and file the same with the clerk thereof.

Afterward, on the 23d day of November, A. D. 1878, at the October term of said court, among others, the following proceedings were had, to wit:

47 *Continued.*

BENJAMIN W. LEWIS
vs. } 4407.
ADOLPHUS MEIER *et al.*

Afterwards, on the 29th day of April, A. D. 1879, at the April term of this court, among others, the following proceedings were had, to wit:

Continued.

BENJAMIN W. LEWIS
vs. } 4407.
ADOLPHUS MEIER *et al.*

Further Answer.

District Court, Douglas County.

BENJAMIN W. LEWIS, Jr.,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY *et al.*

1. And this defendant, by leave of the court, further answers and says that the plaintiff ought not to have his action against this defendant, because it says that the said so-called income mortgage in the petition mentioned and the bonds purporting to be secured thereby were wrongfully and unlawfully executed, and were without any consideration to this defendant.

2. And this defendant says that on the first day of July, 1865, two several contracts for the construction of portions of its railroad were executed with this defendant by R. M. Shoemaker, E. Miller, J. C. Butler, N. Baird, C. S. Greeley, G. F. Filley, J. Archer, and S. M. Edgell, the first for its road from Lawrence to Fort Riley and the second from Leavenworth to Junction, near Lawrence, copies of which contracts are herewith filed and made Exhibits A and B, and to be here read as if the same were set out at length in this answer; that the consideration in stock, bonds, and

48 lands agreed to be paid for the construction of the road mentioned in said contracts was excessive, greatly exceeding the

cost of construction; that the then president and directors of this defendant were pecuniarily interested in said contracts and participated in the execution of the same, and while said contracts were being performed the said so-called income mortgage was executed and the so-called income bonds, purporting to be secured thereby, were executed and delivered at the rate of ten thousand (10,000) dollars per mile of the railroad contracted to be built as aforesaid to the contractors, which were divided between them and the president and directors of said company in proportion to the sums by them respectively advanced and applied to the construction of the said railroad of this defendant, and this defendant says that the value of the Government and first-mortgage bonds and stock and lands by them received of this defendant and by them converted to their own use for the construction of said road was at least equal to all the outlay of the contractors and directors in the construction of said road, and that all persons and parties receiving said bonds on account of their interests in said construction contracts were well aware of the terms of the same, and that the president and directors of this defendant, who executed said so-called mortgage and bonds, having absolute control of defendant company, were, from the first, interested in said contracts and participated in the execution of the same, and that said so-called mortgage and bonds were executed without any good or valid consideration therefor.

3. And this defendant further says that on the first of October, 1866, its then president and directors entered into a further contract in the name of this defendant with C. S. Greeley, R. E. Carr, W. McPherson, S. M. Edgell, R. M. Shoemaker, E. Miller, M. Baird, and J. W. Kinney for the construction of its railroad between the 140th mile-post and the point west to which the United States Govern-
49 ment had granted bonds in aid of the construction of defendant's railroad, which contract is herewith marked Exhibit C, and to be read as a part of this paragraph of defendant's answer; that the president and directors of this defendant were interested in and participated in the execution of this said contract, and at the time of the execution of said contract it was agreed between them and said contractors that they should be so interested, and that said nominal contractors well knew, as did the president and directors, all the facts and circumstances connected with the execution of said so-called income mortgage in the second paragraph of this answer stated. They well knew that the said so-called mortgage was executed without any intention or expectation of borrowing money to be used by this defendant in the construction of its road by the issue of the bonds purporting to be secured thereby, and the said contractors, president and directors of this defendant, and other parties in interest proceeded with the construction of said road specified in said contract, and received of the Government bonds of this defendant and its first-mortgage bonds of the road constructed, and of the capital stock of this defendant, and in money from this defendant, in value at least equal to the outlay by them incurred in constructing said road, and in addition thereto they issued and divided among themselves, in proportion to their respective advances

of the so-called income bonds in the petition mentioned, bonds at and after the rate of ten thousand (10,000) dollars per mile of the road by them so constructed.

Wherefore defendant says that said so-called bonds were issued without any consideration, and they and said so-called mortgage are and ought to be decreed to be void.

And this defendant prays that upon the hearing of this cause a decree may be entered annulling said so-called mortgage and bonds for the delivery of said so-called bonds to defendant, and for
50 the discharging of said so-called mortgage of record in all places where it is recorded, and for such other relief as to equity doth belong.

CHAS. MUNROE,
Attorney for Defendant.

Agreement made and concluded this first day of July, A. D. eighteen hundred and sixty-five, between the Union Pacific Railway Company, Eastern Division, of Kansas, of the first part, and Robert M. Shoemaker, Edward Miller, Jos. C. Butler, Matthew Baird, Carlos S. Greeley, Giles F. Filley, James Archer, and Stephen M. Edgell, of the second part, witnesseth:

First. For and in consideration of the covenants and stipulations hereinafter mentioned to be performed by the party of the first part, the parties of the second part hereby agree to furnish all the materials and equipments, iron, nails, chains, spikes, sleepers, timber, masonry, rolling-stock, and other material needed to build, construct, and equip for the party of the first part a first-class railroad, with the needful turnouts, from the town of Lawrence, in Kansas, to Fort Riley, and telegraph line, substantially on the route which has been surveyed for said railroad company, reference being had to their maps, plans, and profiles, and to construct and build such first-class railroad and telegraph line and appurtenances in the manner described in an act of Congress passed July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and the other acts of Congress passed in reference to said railway company, and to supply the depots, water stations, engines, and cars, in accordance with the terms of said acts of Congress, complete as a first-class railroad, all to be done within the time in said acts specified.

Second. In consideration of the construction of said road and sidings, &c., as in the foregoing section mentioned, the party of the first part agree to pay to the parties of the second part, the sur-
51 vivor or survivors of them, the full sum of fifty thousand ($50,000) dollars per mile of main track measurement, as follows: Twenty-five thousand ($25,000) dollars in the capital stock of the Union Pacific Railway Company, Eastern Division, for which full-paid certificates shall be issued, and in cash twenty-five thousand ($25,000) dollars, which said sum of fifty thousand ($50,000) dollars is to be paid *pro rata* in such certificates of stock and cash on the

estimate of an engineer to be designated for that purpose by the party of the first part, such estimate to be made every thirty days, as the work progresses, in proportion to the work done and material furnished: Provided, That said company may retain fifteen per cent. of such estimate until each successive section of twenty miles is completed according to this contract, and full payment shall be made, in accordance with the terms in this contract specified, upon the completion and acceptance by the Government of the United States of each division of twenty miles.

Third. It is further agreed by and between the parties hereto that all of the work under this contract and all the materials shall be performed and supplied to the full satisfaction of the board of directors of the said Union Pacific Railway Company, E. D.; and if the said parties of the second part, the survivor or survivors of them, shall fail to perform the work herein contracted to be done as fast as said board shall from time to time reasonably require, or shall do any kind of said work imperfectly or not in accordance with the acts of Congress aforesaid, then the party of the first part is authorized to terminate this contract, paying said parties of the second part, the survivor or survivors of them, for the work actually done and the materials supplied only, and the said party of the first part may thereupon do said work or contract with any other party therefor, and no damage shall be claimed by the party of the second part, the survivor or survivors of them.

52 It is further understood and agreed that in case of a failure on the part of the parties of the second part, as mentioned in this section, then and thereupon the fifteen per cent. of the amount of the monthly estimate previously made shall be held and permanently retained by said parties of the first part as liquidated damages, and the said parties of the second part, the survivor or survivors of them, shall make no claim therefor.

Fourth. It is further understood that in the event of the death of either or any of the parties of the second part this contract shall not thereby be terminated, but the surviving parties shall proceed to the completion of this contract without interference upon the part of the personal representatives of the deceased party or parties, and in such case the party of the first part shall not be liable to account to or with the personal representatives of the deceased party, nor until the completion of this contract, and such accounting shall then be had between the party of the first part and the survivors of said deceased and not with his representatives.

Fifth. It is further agreed and understood that said parties of the second part shall have the control and use of the road, being liable for all expenses and entitled to all receipts therefrom, until the completion and equipment of said road to Fort Riley, according to the terms of this contract, the party of the second part carrying the mails, troops, and munitions of war as required by the law.

In testimony whereof the party of the first part have caused this agreement to be signed by their president and the corporate seal

fixed, and the parties of the second part have affixed their hands and seals the day and year first above written.

R. M. SHOEMAKER. [L. S.]
JOSEPH C. BUTLER, [L. S.]
C. S. GREELEY. [L. S.]
GILES F. FILLEY. [L. S.]
53 JAMES ARCHER. [L. S.]
S. M. EDGELL. [L. S.]
EDWARD MILLER. [L. S.]
M. BAIRD. [L. S.]
JOHN D. PERRY, *President.*
U. P. RAILWAY COMPANY, E. D. [SEAL.]
J. P. DEVEREUX, *Secretary.*

In presence of witness—
H. P RUTTER.

Agreement made and concluded on the first day of July, 1865, by and between the Union Pacific Railway Company, Eastern Division, the party of the first part, and Robert M. Shoemaker, Matthew Baird, Edward Miller, Joseph C. Butler, Carlos S. Greeley, Giles F. Filley, James Archer, and Stephen M. Edgell, the party of the second part, witnesseth:

First. The party of the second part agree and bind themselves to construct and equip a first-class railway, as now located, from the city of Leavenworth, in the State of Kansas, to the junction of the completed road of said company at or near the town of Lawrence, Kansas, with all the needful stations and necessary rolling-stock (not less than $150,000 in value) complete, as a first-class railway, as provided for by the charter of said company and the acts of Congress in relation thereto; to finish said railway and deliver the same to said company in good running order on or before the first day of May, 1866.

Second. In consideration of the covenants to be performed by said party of the second part, as set forth in the previous section, the party of the first [part] agree- to pay said party of the second part the full sum of six hundred thousand dollars in the first-mortgage seven per cent. bonds of said railway company based upon that portion of their road to be constructed under this contract and also bonds of the county of Leavenworth, to be issued by said county, amounting to two hundred and fifty thousand ($250,000) dollars; also twenty-two thousand ($22,000) dollars per mile in full-paid capital
54 stock of the Union Pacific Railway Company, Eastern Division, for the actual number of miles of railway constructed between Leavenworth and the point of connection at or near Lawrence.

Third. It is agreed that the said company shall from time to time, and as fast as shall be required by the said contractors, make sale and conveyance of the Delaware lands at prices to be fixed by said contractors, and shall appoint an agent to superintend and take charge of the said lands and to make such sales, which agent shall

be satisfactory to the said contractors. Out of the proceeds of the sales of the said lands the said company shall pay and reserve the costs and expenses of the said sales, including the services of the said agent, and the amount heretofore paid, or which may become due, or for which the company is liable, to the Government of the United States for the said lands, or on account thereof, and the residue of the said proceeds shall be paid to the said contractors as part of the compensation for the performance by them of their contract; and at the completion of this contract the said company shall transfer and convey to said contractors the residue of the said lands unsold, subject to the payment of all moneys payable for or on account of the same to the Government of the United States, the intention of the said company being to appropriate and dispose of the said lands for the benefit of said contractors, and to secure to them the same and the proceeds thereof as compensation for the faithful performance by them of their contract.

Fourth. The payments arising out of this contract, as provided for in the seven (7) per cent. bonds of the said railway company and county of Leavenworth, shall be made by the said party of the first part to the said party of the second part every thirty (30) days *pro rata* as the work progresses, according to the terms of this agreement.

The said party of the first part shall retain 20 per cent.
55 until the work contracted to be done is completed and said railway is finished and equipped, when full and final payments shall be made by said party of the first part to said party of the second part.

In witness whereof the parties hereto of the second part have affixed their hands and seals, and the party of the first part hath caused its corporate seal to be hereto affixed and this instrument to be signed by its president the day and year first above mentioned.

[U. P. Railway Company's Seal.]

R. M. SHOEMAKER. [L. S.]
JOSEPH C. BUTLER. [L. S.]
C. S. GREELEY. [L. S.]
GILES F. FILLEY. [L. S.]
JAMES ARCHER. [L. S.]
S. M. EDGELL. [L. S.]
EDWARD MILLER. [L. S.]
M. BAIRD. [L. S.]

JOHN D. PERRY, *President.*
JOHN P. DEVEREUX, *Secretary.*

Witness:
H. P. RUTTER.

An agreement made and concluded this first day of October, 1866, between the Union Pacific Railway Company, Eastern Division, of he first part, and Carlos S. Greeley, Robert E. Carr, William McPherson, Stephen M. Edgell, Robert M. Shoemaker, Edward Miller, Matthew Baird, and Joseph W. Kenney, parties of the sec-

ond part, contractors, carrying on the business of this contract under the firm-name of Shoemaker, Miller & Co., witnesseth:

That for and in consideration of the covenants and stipulations hereinafter contained to be performed by the party of the first part, the parties of the second part hereby agree to furnish all the materials, equipments, iron, rails, chairs, spikes, sleepers, timbers, bridges, masonry, rolling-stock, poles, wire, and other material needed, and to build, construct, and equip for the parties
56 of the first part a first-class railroad and telegraph line from the present western terminus of said Union Pacific railway, Eastern Division, on the Government reserve at Fort Riley, and west from the Missouri river 140 miles, to such point on the waters of the Smoky Hill river as said railroad is subsidized in bonds by the acts of Congress of July, 1862, and the several acts amendatory and supplementary thereto, said point or distance supposed to be 250 miles. The equipments for said road to be as follows: for each and every thirty (30) miles two (2) first-class engines, one (1) first-class passenger car, fifteen (15) box cars, ten (10) platform cars, one (1) baggage car to every forty (40) miles, and the necessary hand cars, with all necessary engine-houses, shops, tools, machinery, shafting, &c., complete for maintaining an ample equipment to operate the road; the said railway and telegraph line to be constructed under this contract; to be located along the route on the waters of the Smoky Hill, which has already been indicated by a preliminary survey of the first part, but subject to such changes upon actual survey, as the road progresses, as the said party of the first part shall deem it necessary to make, reference being had to the maps, plans, and profiles of the company, to be found in the office of their engineers; all of the said railroad and telegraph line to be fully completed and equipped by the 31st day of December, 1867, in the manner herein provided, and fully to meet the requirements of the several acts of Congress hereinbefore mentioned, so as to make the same in all respects a first-class railroad and telegraph line.

In consideration of the construction and equipment of the said railroad and telegraph herein provided for and the performance of the undertaking hereinafter mentioned the party of the first part agrees to — the parties of the second part the following bonds, stocks, and lands, to wit, all the bonds from the Gov-
57 ernment of the United States when received, said bonds being issued in pursuance of the act of Congress of July, 1862, and the acts amendatory thereof and supplemental thereto, said bonds being at the rate of $16,000 per mile; all the first-mortgage bonds of said party of the first part issued under a first mortgage of said party, beginning at and from the 140th mile post of this its railway west from its initial point on the Missouri river, at the State line between said State of Missouri and the State of Kansas, and extending to the terminus of the railroad and telegraph to be constructed under this contract, said first-mortgage bonds to be issued at the rate of $16,000 per mile and no more on the said line of railroad and telegraph line westward from said 140th mile post, and may be issued in advance to the extent of 100 miles

of a continued completed line of said railway company, as provided for by act of Congress; said bonds are dated June 1st, 1866, payable in thirty years in the city of New York, with interest warrants attached, payable semi-annually at the same place in the gold coin of the United States of America, ten thousand dollars per mile in the income bonds of the company for each and every mile of railroad and telegraph line built under this contract, and which said income bonds are secured by a certain deed of trust from the said party of the first part to Carlos S. Greeley, Adolphus Meier, trustees, dated the first day of July, 1866, and of the full-paid capital stock of the party of the first part $8,000 per mile for each and every mile of railway and telegraph line built under this contract, and, in addition thereto, the party of the first part shall pay to the party of the second part $400,000 of the income bonds and $600,000 of the stock of said Union Pacific Railway Company, Eastern Division, as the said parties of the second part shall pay the debts of the company hereinafter mentioned.

And it is further agreed between the parties hereto, and
58 as a part of the consideration to the said parties of the second part for the performance of their undertakings herein mentioned, that whatever lands the said party of the first part may have the right to acquire by purchase from the United States Government under the treaty with the Pottawatomie nation of Indians, of date the 15th November, 1861, such rights of purchase, and all other rights incident thereto, may and shall enure to the use and benefit of the parties of the second part to this contract by their paying the purchase-moneys for said lands and interest required by said treaty, and by assuming and discharging all obligations imposed on said party of the first part to acquire said lands by the provisions of the same; and the said party of the first part covenants and agrees with the said party of the second part to accept the terms and provisions of said treaty, and in accordance therewith to contract for the purchase of said lands, and upon the request of the party of the second part to assign said contract of purchase to them, with the request that patents be made directly to said parties of the second part, or their assigns, and if the title to said lands shall be by the United States vested in the party of the first part, then to convey said lands, by good and sufficient title, to the parties of the second part, or their assigns, in accordance with the terms of this agreement.

It is further understood and agreed that the first-mortgage bonds aforesaid are to be delivered to the parties of the second part, as the necessities of the said parties of the second part may require, to enable them to perform this contract, but not in advance of 100 miles of a continued completed line of railway of said party of the first part.

And the said income bonds at the rate of $10,000 per mile shall be delivered as the said railroad and telegraph line shall be from time to time accepted by the Government, and turned over to said parties of the first part by the said parties of the second part,
59 as hereinafter provided; all of the said bonds and stock to be delivered as herein provided to said parties of the second

part or their assigns, and any title to the said Pottawatomie lands passing to the said railway company the said parties of the second part or their assigns are to be invested with when all their agreements with reference thereto shall be fully performed, such conveyance to be made and all other expenditures in and about said lands at the proper cost and charges of said parties of the second part.

It is further understood and agreed that, as each and every division of the railroad and telegraph line to be constructed under this contract is completed and accepted by the United States Government, it shall be with its equipments turned over to the said party of the first part, the party of the second part performing any work thereafter which the United States commissioners may require to be done on the same and subject to the approval of the board, and all the work to be done under this contract shall be performed and all the equipments and materials supplied to the satisfaction of Government commissioners and board of directors of said Union Pacific Railway Company, Eastern Division; and it is agreed and understood that all the railroad and telegraph line herein provided to be built shall conform in every respect to the profiles, maps, drawings, and specifications of the said railway company; and if, in the opinion of the said board of directors of the party of the first part, the parties of the second part shall neglect or refuse to prosecute the work herein undertaken to be done and performed in such manner as to give reasonable assurance of the complete performance of their contract within the time limited and stipulated, then it shall be lawful for the said party of the first part to declare this contract terminated, and they may enter upon the said premises and prosecute the work to completion at the expense of the contractors, applying the assets to be paid them to the payment for the work, or an account may be stated under the direction of an engineer for that purpose selected by the board of directors of the value of all work done, material furnished and on hand, in process of manufacture, or in transit, all of which in such event shall be the property of the party of the first part, and shall be accounted for at its fair value, to be, with the work done, estimated by the said engineer, whose decisions shall be final, and shall be credited to the said party of the second part in the payment for the mortgage bonds, stock, and lands advanced them, and if a balance shall be found due said parties it shall be paid to them; but if said party shall be found indebted to said party of the first part on account of advances, such advances shall be returned in kind, or in default of which said party shall pay the company the par value of said advances in money; and it is further understood and agreed that the said party of the first part shall at all times upon request transport over that road and to the exclusion of all other business, except Government business, all the rails, ties, spikes, bridges, material, and other supplies of said parties of the second part to aid them in the completion of the contract within the time provided; and it is further agreed, subject to the provisions hereof, that all the iron, spikes, chairs, cars, locomotives, and rolling-stock of every description, and all other materials to be furnished by said parties of

the second part under this contract are, when purchased and wherever situate, the property of the said parties of the second part and at their risk, and shall not become, under this contract, the property of the railroad company until after the several divisions of the road for which said equipments and material was provided are accepted respectively by the Government and turned over to the company, as herein provided. And for the transportation to be done as aforesaid for the parties of the second part by the party of the first part they
61 are to charge a rate not to exceed two (2) cents per bar per mile for rails, chairs, ties, bridges, and other articles required for the construction of the road, for each and every mile transported over the road, whether or not any portion of said road shall have been turned over at the time to the company by the contractors, and no charge shall be made by said railroad company for the original transportation of any locomotives or rolling-stock going out to said contractors to such point on said road as may be required by the contractors.

It is further understood and agreed that in the event of the death of either or any of the parties of the second part this contract shall not thereby be terminated, but the surviving parties shall proceed to the completion of this contract without interference on the part of the personal representatives of the deceased party or parties, and in such case the party of the first part shall not be liable to account to or unto the personal representatives of such deceased party until the completion of this contract, and such accounting shall then be had between the party of the first part and the survivors of such deceased, and not unto his personal representatives. Said party of the first part will transport all the laborers and employees of the contractors free of charge over the road when desired by the contractors, or their duly authorized agent or officer, and the special car of the general manager of contractors shall be transported free.

Said party of the first part will also transfer to the contractors all rights to take timber, wood, &c., to be obtained or had upon the Delaware reserve from the Missouri River Railroad Company, or its assigns, the contractors paying the stipulated price therefor.

It is further understood and agreed that the party of the second part shall pay all expenses of rights of way, engineering, and
62 all expenses of this general character, stations, water-tanks, engine-houses, shops, &c., to be furnished at such points as the railroad company may decide.

It is further understood and agreed that if the parties of the second part should be obstructed by the acts of hostile Indians, or if, for any other reasonable cause, a majority of the contractors, parties of the second part, should desire to stop the construction at any point east of the western terminus designated in this contract, then and in either of those events they, upon notice in writing to the company, shall be released from the fulfillment of the balance of said contract, receiving payment only for the actual distance constructed and equipped, work done, and additional material turned over to the company at the *pro rata* rate for work and such materials in securities of the several kinds herein designated.

It is further understood and agreed that, in further consideration

of the payments hereinbefore recited to be paid by the party of the first part, the parties of the second part shall pay the unfunded cash debts and obligations of the Union Pacific Railway Company, Eastern Division, existing at the termination of the contracts with Robert M. Shoemaker & Co., estimated at $450,000, but not to exceed $500,000. In the event of the parties of the second part determining for any of the reasons hereinbefore stated to suspend the execution of the work, the value of the work done and material provided by said parties, estimating the same at the prices herein stipulated to be paid according to the value of such price, shall be determined by the engineer of the company appointed or to be appointed for that purpose, and his decision shall be final.

And it is further agreed that the parties of the second part shall and will pay all the accrued interest on said first-mortgage bonds at the time of delivery and the interest to accrue thereon for one year thereafter, and to indemnify and save the party
63 of the first part harmless on account of said interest, and will provide said party of the first part at a reasonable time in advance of said interest becoming due the necessary funds for the payment of the same, in default of which said party may retain any assets of said party of the second part, or any security or land to be paid under this contract, and apply the same to such payment, or hold the same till this part of the agreement is complied with.

In witness whereof the parties of the second part have hereto set their hands and seals and the party of the first part has caused its seal to be hereunto affixed and these presents to be signed by its president and attested by its secretary this first day of October, 1866.

(Signed) JOHN D. PERRY, *Pres.* [L. S.]
" C. S. GREELEY.
" S. M. EDGELL.
" ROBERT C. CARR.
" WM. M. McPHERSON.
" EDW. MILLER.
" M. BAIRD.
" R. M. SHOEMAKER.
" J. N. KINNEY.

[Seal Union Pacific Railway Company, Eastern Division.]

CHAS. B. LAMBORN, *Secretary.*

I certify the above and foregoing to be a true copy.
Attest: CHAS. B. LAMBORN, *Secretary.*

Indorsed: No. 4407. Benjamin W. Lewis, Jr., *vs.* Kansas Pacific Railway Company *et al.* Further answer filed October 24th, 1879. B. D. Palmer, cl'k, by J. W. Neill, deputy.

On application of defendant company it is ordered that the within further answer be filed and made a part of the answer in this
64 cause—copy to be furnished plaintiff's attorney.
Oct. 24, 1879. N. T. STEPHENS,
Dist. Judge.

Afterward, on the 10th day of November, at the October term, A. D. 1879, of said court, among others, the following proceedings were had, to wit:

Continued.

BENJ. W. LEWIS
vs.
ADOLPH MEIER *et al.* } 4407.

Afterward, on the 13th day of March, A. D. 1880, in the office of the clerk of the said court was filed a stipulation for amendment to answer and reply, and is in words as follows, to wit:

District Court of Douglas County, State of Kansas.

BENJ. W. LEWIS, Jr.,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY } No. 4407.

Application being made by plaintiff for leave to file a reply in this cause, upon stipulation it is agreed that the defendant, The Kansas Pacific Railway Company, have leave to amend and file additional answer by Monday next, and that the plaintiff shall file reply within three days after amendment filed.

Lawrence, M'ch 13, 1880.

J. W. GREENE,
Att'y for Plaintiff.
CHAS. MONROE,
Att'y for Defendant, The Kansas Pacific R'l'y Co.

Indorsed: 4407. B. W. Lewis, Jr., *vs.* The Kansas Pacific Railway Co. Stipulation for amendment to answer and for reply. Filed March 13th, 1880. B. D. Palmer, cl'k, by W. J. Neill, Jr., deputy.

And on the same day, March 13th, A. D. 1880, in the office of the clerk of said court, was filed the amendment to answer, and is
65 in words and figures as follows, to wit:

District Court, Douglas County.

BENJAMIN W. LEWIS, JR.,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY.

Amendment to the "further answer" of the Kansas Pacific Railway Company, defendants, to be inserted and read as paragraph four of said "further answer," before the word wherefore.

4. And this defendant further says that the said so-called mortgage and bonds were not executed for the purpose of enabling this defendant to raise money to construct, equip, and operate its railroad, or for the liquidation of any indebtedness incurred by this defendant in the construction of its railroad or any part thereof, but the same were executed for the personal advantage and benefit of

the president and directors executing said mortgage and bonds, the contractors in the exhibits hereto mentioned, and other parties in combination and interested with them, all which was well known to each and every of them handling and receiving said bonds from the president and directors or the agents of said company, contractors, and associates of any or either of them.

That for all the work, labor, materials, or other outlay on behalf of this defendant in the construction of said railroad, or on any account whatever, the said president and directors of defendants, the before-named contractors and their associates, each and every of them were doubly paid for all their outlay on behalf of this defendant in Government bonds in first-mortgage bonds of this defendant, in the capital stock of this defendant, and in lands of this defendant, and that said so-called income bonds, each and every of them, were issued by said president and directors for their own gain and interest and in the carrying out of contracts in which they were personally interested and without any good or valuable consideration to this defendant.

66 That the Government bonds by the contractors received at the rate of sixteen thousand dollars per mile were equivalent to all the money expended in the construction of the railroad of defendant; that the first-mortgage bonds of defendant, at the rate of sixteen thousand dollars per mile, were worth ninety cents to the dollar of said bonds.

In addition thereto the contractors were paid five hundred thousand dollars in money, and this besides the stock, worth fifteen dollars per share of fifty dollars each, issued to the president and directors and the contractors by themselves at the rates per mile specified in said contracts; all which matters and things hereinbefore alleged the said contractors well knew.

CHAS. MONROE,
Att'y for Defendant, the Kansas Pacific R'l'y Co.

Indorsed: 4407. B. W. Lewis, Jr., *vs.* The Kansas Pacific R'l'y Co. Amendment to answer. Filed March 13th, 1880. B. D. Palmer, cl'k, by W. J. Neill, Jr., deputy.

Afterward, on the 15th day of March, A. D. 1880, was filed in the office of the clerk of said court a reply to the "amendment to answer" of the defendant, The Kansas Pacific Railway Company, and is in words as follows, to wit:

Reply.

In District Court, Douglas County, State of Kansas.

BENJAMIN W. LEWIS, Plaintiff,
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, and THE KANSAS PACIFIC RAILWAY COMPANY, Defendants. } No. 4407.

And now comes plaintiff, *and* leave of court first having been had

and obtained, and files this his reply to the separate amended answer of defendant, The Kansas Pacific Railway Company, and says:

That he denies each and every allegation in said amended answer contained.

67 J. W. GREENE,
Plaintiff's Attorney.

Indorsed: No. 4407. Benj. W. Lewis *vs* Adolphus Meir *et al.* Reply. Filed March 15th, 1880. B. D. Palmer, cl'k. W. J. Neill, deputy.

And on the same day, March 15th, 1880, in the office of the clerk of said court, was filed a reply to amended answer of defendants Meier & Greeley, and is as follows, to wit:

Reply.

In District Court, Douglas County, State of Kansas.

BENJAMIN W. LEWIS, Plaintiff,
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, and THE KANSAS PACIFIC RAILWAY COMPANY, Defendants, } No. 4407.

And now comes plaintiff and, leave of court first having been had and obtained, files this his reply to the separate amended answer of the said defendants, Adolphus Meier and Carlos S. Greeley, filed herein, and says that he denies each and every allegation in said answer contained inconsistent to the said petition of plaintiff.

J. W. GREENE,
Plaintiff's Attorney.

Indorsed: No. 4407. Benj. W. Lewis *vs.* Adolphus Meier *et al.* Reply. Filed March 15th, 1880. B. D. Palmer, cl'k. W. J. Neill, Jr., deputy.

Afterward, on the 18th day of June, at the April term of said court, A. D. 1880, among others, the following proceedings were had, to wit:

BENJAMIN W. LEWIS, Pl'ff,
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, and THE KANSAS PACIFIC RAILWAY COMPANY, Def'ts. } 4407.

And now, at this day, this cause came on to be heard, said plaintiff appearing by J. R. Shepley, Esq., and J. W. Green, his attor-
68 neys, and the said defendants, by J. P. Usher and Chas. Monroe, Esqrs., their attorneys.

And thereupon said plaintiff moved the court for leave to dismiss his action as set forth in his said petition filed herein without prejudice to bringing a new action thereon, and thereupon said defendant, the K. P. Railway Company, moved the court that the pleading of said defendant filed herein shall be taken, considered,

and adjudged as a counter-claim against said plaintiff, and that said defendant have the right of proceeding to the trial of its claim, as set forth in its said pleading, which said motion was argued by counsel. Upon consideration whereof it is ordered, adjudged, and decreed that the plaintiff herein be allowed to dismiss his said action, and that the same is hereby dismissed without prejudice to said plaintiff bringing a new action upon his said cause of action.

It is further adjudged and decreed that the pleadings herein of said def't, K. P. R. Co., sets forth a cause of action in favor of said defendant and against said plaintiff, and sets forth and is in form a counter-claim in favor of said defendant and against said plaintiff, and that said defendant should have a right of trial on its said counter-claim.

It is therefore ordered that said cause be set down for trial on the counter-claim presented by said defendant against said plaintiff; to which decision and ruling of the court, on the motion of defendant, said plaintiff then and there excepted and still excepts.

It is further ordered by the court that the hearing and trial of said counter-claim be continued until the next term of this court, and that said plaintiff have until the 1st day of August, A. D. 1880, to amend his reply.

Afterward, on the 18th day of June, A. D. 1880, in the office of the clerk of said court, was filed the "dismissal of cause by
69 plaintiff," and is in words and figures as follows, to wit:

In the District Court, Douglas County, State of Kansas.

BENJAMIN W. LEWIS, Jr.,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY *et al.* } No. 4407.

And now comes Benjamin W. Lewis, Jr., the plaintiff, and in obedience to the injunction upon him made by the circuit court of the United States in the decree rendered by said court on the 4th day of June, 1879, in the case of John A. Stewart against the Kansas Pacific Railway Company, said Benjamin W. Lewis, Cyrus B. Burnham, Henry M. Alexander, & The United States of America, which last-mentioned suit was commenced in the said circuit court of the United States prior in time to the above-entitled cause in said district court of Douglas county, I, the said Benjamin W. Lewis, Jr., plaintiff in this suit, do dismiss this cause without prejudice to any other that may be hereafter commenced on the causes of action sued on in said suit in said Douglas county.

The said decree in said circuit court is in the words & figures following, to wit:

At a stated term of the circuit court of the United States for the district of Kansas held at Leavenworth on Wednesday, the fourth day of June, eighteen hundred and seventy-nine.

Present: Hon. C. G. Foster.

JOHN A. STEWART
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, BENJAMIN W. LEWIS, William Lewis, and Cyrus B. Burnham, Henry M. Alexander, and The United States of America.

This cause coming on now to be heard upon bill, answers,
70 and evidence, and after hearing counsel for the respective parties, viz., Messrs. Hitchcock, Lubka and Player, for the complainant; Mr. Charles Monroe, for the railway company; Mr. John R. Shepley, for Benjamin W. Lewis; Mr. James Taussig, for William J. Lewis and Cyrus B. Burnham, it is now ordered, adjudged, declared, and decreed by the court as follows:

First. That by reason of the death of John Edgar Thomson, and subsequently of Matthew Baird, who was appointed trustee in his place, and the non-appointment of any successor of said Baird, and of the resignation of Adolphus Meier from his trusteeship and the acceptance thereof, and the non-appointment of any trustee in his place, the complainant, John A. Stewart, has become and now is the sole remaining trustee under the indenture of mortgage and deed of trust, dated June twentieth, 1869, from the Kansas Pacific Railway Company to John Edgar Thomson, Adolphus Meier, and John A. Stewart, trustees in the proceedings mentioned, and as such the said John A. Stewart is now solely vested with the said trust and the estate and rights originally vested in the said three trustees, but subject to have hereafter a trustee or trustees duly associated with him in case of the due filling of the now existing vacancies in the trusteeships or either of them; and, upon motion of the complainant, this suit is dismissed as against the defendants, Henry M. Alexander and the United States of America, with like effect as if they had not been made parties defendant.

Second. That there have been duly issued and are now outstanding and secured by the said indenture of mortgage and deed of trust of June 20th, 1869, six thousand three hundred and seventy-nine bonds, each for the principal sum of one thousand dollars ($1,000) and interest thereon, which are respectively outstanding in the hands of lawful holders thereof for value who are entitled, in respect thereof, to the security of the said mortgage or deed of trust,
71 and there remains owing and unpaid upon each of said bonds the principal sum of one thousand dollars ($1,000), besides interest, but such principal is not yet due and payable, nor will the same be due and payable until May first, eighteen hundred and ninety-nine, unless before that time there shall be such an election making the same presently due and payable, as by the terms and conditions of the said mortgage or deed of trust securing the same is authorized in case of sixty days' continued default in payment of the semi-annual interest to be declared and made by the holders of a majority in interest of the bonds secured by said indenture, or by the trustee or trustees, subject to the direction and control in that behalf of such majority in interest.

Third. That there remains owing and unpaid for deferred or

funded interest upon the said six thousand three hundred and seventy-nine outstanding bonds secured by said indenture of mortgage and deed of trust the whole of the semi-annual interest coupons thereon which fell due on November first, 1873, and May first, 1874, respectively, and one-half of the semi-annual interest coupons thereon which fell due on November first, 1874, May first and November first, 1875, and May first and November first, 1876, respectively, being in the whole one hundred and fifty-seven dollars and fifty cents per bond, and amounting altogether to one million four thousand six hundred and ninety-two dollars and fifty cents ($1,004,692.50), without reckoning any interest upon the amount of such coupons and halves of coupons after their maturity, for which amount of deferred or funded interests there have been issued by said railway company, and are now outstanding in the hands of various holders who are entitled in respect thereof to the security of the said mortgage or deed of trust of June twentieth, 1869, so-called interest certificates, promising to pay on May first, eighteen hundred and eighty-six, the original amount of such coupons and halves of coupons, respectively, and meanwhile to pay periodically interest on such amount at the rate of six per
72 cent. per annum, such interest in respect of the certificates issued for said whole interest coupons falling due November first, 1873, and May first, 1874, being payable yearly on each first day of November, and the same being unpaid from and including such interest payment on such certificates which fell due on November first, eighteen hundred and seventy-six, and such interest on the said certificates issued for the five unpaid halves of coupons above mentioned, being payable semi-annually on each first day of May and November respectively, and the same being unpaid from and including the interest payment on such certificates which fell due on November first, 1876, and the whole amount of interest which has fallen due and now remains due and unpaid upon all such interest certificates issued for such deferred and funded coupons and halves of coupons (with the addition thereto of an amount of 17.50 included in a coupon for 19.60 which matured November 1, 1876, attached to the funded interest certificate issued for the above-mentioned funded halves of the five coupons which matured from November 1, 1874, to November 1, 1876, respectively, which amount of 17.50 represents that one-half of the bond coupon maturing November 1, 1876, which, by the terms of the funding arrangement of 1874, was to be paid at maturity, leaving the other half to be funded), amounts to two hundred and seventy-two thousand five hundred and ten dollars and eighty-eight cents ($272,510.88), without reckoning any interest on such interest on interest certificates or on said sum of $17.50 due November 1, 1876, from the time when the same became due and payable and the original coupons and halves of coupons for which said certificates were issued and now remain outstanding have not been cancelled, but have been deposited in trust, with preservation of their vitality and of their lien under the mortgage to be resorted to in case of need for the security and payment of the amount of such

interest certificates, which latter are representative certificates,
73 and so represent and stand for the original coupons and halves of coupons for which they were issued, such representative certificates being by their terms liable to become due and payable before the time therein primarily fixed for their payment in case of certain specified default in the payment of the interest coupons on such interest certificates.

And there is owing and unpaid and now presently due and payable for unfunded interest upon the said six thousand three hundred and seventy-nine bonds secured by said indenture of mortgage and deed of trust the whole of the semi-annual interest coupons thereon which fell due on May 1st, 1877, and May 1st, 1878, and November 1st, 1878, and one-half of the semi-annual interest coupon thereon which fell due on November 1st, 1877, being in the whole one hundred and twenty-two dollars and fifty cents ($122.50) per bond, and amounting altogether to seven hundred and eighty-one thousand four hundred and twenty-seven dollars and fifty cents ($781,427.50), without reckoning any interest upon the amount of such coupons and halves of coupons after their maturity, which due and unpaid coupons and halves of coupons are outstanding in the hands of divers holders, who are entitled in respect thereof to the security of the said mortgage or deed of trust of June twentieth, 1869.

Fourth. That for the respective amounts above adjudged to be owing and unpaid and as to a portion thereof now due and payable and as to the other portion thereof yet to become due and payable—that is to say, the said principal sum of six million three hundred and seventy-nine thousand dollars ($6,379,000) owing and unpaid, not yet due and payable, but hereafter to become due and payable for the principal of the said six thousand three hundred and seventy-nine bonds, and the said sum of one million four thousand six hundred and ninety-two dollars and fifty cents ($1,004,692.50) owing and unpaid, and hereafter to become due and payable upon the said inter-
74 est certificates representing and standing for the said deferred and funded interest coupons, and the said sum of two hundred and seventy-two thousand five hundred and ten dollars and eighty-eight cents ($272,510.88) now in arrear and presently due and payable for interest fallen due upon such interest certificates, including the sums of seventeen dollars and fifty cents ($17.50) before mentioned in that behalf and the said sum of seven hundred and eighty-one thousand four hundred and twenty-seven dollars and fifty cents ($781,427.50) now in arrear and presently due and payable for unfunded interest upon said six thousand three hundred and seventy-nine bonds respectively, as likewise for such further interest as hereafter shall accrue or become due and payable upon the said six thousand three hundred and seventy-nine bonds and upon the said interest certificates or the deferred or funded interest which such interest certificates represent and stand for—the holders of the said six thousand three hundred and seventy-nine bonds and of the said interest certificates and of the funded or deferred interest coupons represented by them, and the holders of said unfunded interest coupons

now in arrear respectively, and the complainant as trustees for such respective holders of such bonds, interest certificates, and funded or deferred coupons, and coupons unfunded and in arrear have a valid and subsisting mortgage lien under and by virtue of the said indenture of the mortgage and deed of trust dated June twentieth, 1869, upon all and singular the railroad appurtenances and equipment and other properties, interests, franchises, rights, and things described or mentioned in said indenture of mortgage and deed of trust, and thereby mortgaged or conveyed in trust or purporting so to be for all such amounts adjudged to be now owing and unpaid, and for all such amounts now due and payable or hereafter to become due and payable to such parties respectively, as aforesaid, including all the interest hereafter to accrue or become due and payable thereupon or in respect thereof, and that
75 said mortgage lien above adjudged in favor of the holders of said bonds, interest certificates, and funded or deferred coupons represented by them, and coupons unfunded and in arrear, and of the complainant as trustee for such parties respectively as aforesaid, is prior and paramount to all and any and every lien or claim upon the same railroad appurtenances and other properties, interests, franchises, rights, and things or any of the same or any part or portion thereof or of any or either of them, under or by virtue of the indenture of mortgage in the pleadings mentioned, commonly and hereinafter called the funding mortgage, bearing date October second, 1876, made and executed by the Kansas Pacific Railway Company to the defendants, William J. Lewis and Cyrus B. Burnham, and is likewise prior and paramount to all and any and every lien or claim upon the same railroad appurtenances and equipments and other properties, franchises, rights, and things, or any of the same or any portion or portions thereof or of any or either of the same, under or by virtue of the indenture of mortgage in the pleadings mentioned, commonly and hereinafter called the income mortgage, the same bearing date July first, 1866, and being made by the Kansas Pacific Railway Company under its former title of Union Pacific Railway Company, Eastern Division, to Carlos S. Greeley and Adolphus Meier, as trustees, under which income mortgage the defendant, Benjamin W. Lewis, is now sole trustee in place and stead of the original trustees therein, saving and excepting only such rights as under and in virtue of said income mortgage may exist in favor of the holders of the income bonds issued thereunder and now outstanding to the amount of two hundred and sixty-three thousand and seven hundred dollars ($263,700) of principal, commonly and hereinafter called unsubordinated income bonds, being such bonds on which has not been placed the stamp declaring the same to be subordinated to the lien created by the aforesaid indenture
76 of mortgage and deed of trust dated June twentieth, 1869, and which last-mentioned indenture of mortgage and deed of trust is commonly known and hereinafter designated as the Denver extension mortgage, which said $263,700 of unsubordinated income bonds and any interest which may be due and payable thereon have and are a prior and paramount lien upon the property covered

by said income mortgage to the lien created by said indenture of mortgage and deed of trust dated June 20th, 1869, but it is expressly declared and adjudged that, so far as respects all the other bonds issued under said income mortgage upon which the stamp aforesaid has been placed and which are commonly and hereinafter called subordinated income bonds—that is to say, all said bonds issued under said income mortgage, excepting said amount of two hundred and sixty-three thousand and seven hundred dollars ($263,700) of unsubordinated income bonds—the said income mortgage and its lien is legally subordinate, as aforesaid, to the said Denver extension mortgage and to the prior and paramount rights and liens herein adjudged in favor of the bondholders, coupon-holders, interest-certificates holders, and trustees under said Denver extension mortgage, and the said William J. Lewis and Cyrus B. Burnham, as trustees under said funding mortgage, and their successors and all persons claiming under them are hereby perpetually enjoined and restrained from taking any legal proceeding otherwise than by suit in this court, to which the trustee or trustees for the time being of the said Denver extension mortgage shall be duly made parties defendants, for the enforcement of said funding mortgage as against any of the property, franchises, rights, or things covered by or embraced in said Denver extension mortgage and from taking — in any suit or in anywise any proceeding which shall not expressly recognize, admit, and give effect to such prior and paramount lien under the Denver extension mortgage, as hereinbefore adjudged,

77 and the said Benjamin W. Lewis, as trustee under the said income mortgage, and his successors and all claiming under him, is and are hereby perpetually enjoined and restrained from taking or carrying on or continuing any legal proceeding otherwise than by suit in this court, to which the trustee or trustees, for the time being, of the Denver extension mortgage shall be duly made parties defendant, for the enforcement of such income mortgage, or the assertion of any rights thereunder as against any of the property, franchises, rights, or things covered by or embraced in said Denver extension mortgage, and from taking in any suit or in anywise any proceeding which shall not expressly recognize, admit, and give effect to such prior and paramount lien under the Denver extension mortgage as is hereinbefore adjudged and declared, saving only such rights, if any, as may appertain to the holders of said unsubordinated income bonds, amounting to two hundred and sixty-three thousand and seven hundred dollars ($263,700) of principal.

Fifth. That the defendant, The Kansas Pacific Railway Company, do and shall within twenty days after the entry of this decree pay or cause to be paid the amounts hereinbefore adjudged to be now presently due and payable and to be secured under the indenture of mortgage and deed of trust aforesaid—that is to say, the sum of seven hundred and eighty-one thousand four hundred and twenty-seven dollars and fifty cents ($781,427.50) due and in arrear on or for said unfunded interest coupons on said six thousand three hundred and seventy-nine bonds, and the sum of two hundred and seventy-two thousand five hundred and ten dollars and

eighty-eight cents ($272,510.88) due and in arrear for interest upon said interest certificates representing deferred or funded interest on said bonds, including the said sums of $17.50 before mentioned in that behalf, which payment shall be so made by said railway company by paying over such amounts under the direction of the complainant to the United States Trust Company of New York, to be by said company applied to paying and
78 taking up from the respective holders thereof or such of them as will consent to receive the same and surrender the coupons under the terms and conditions hereinafter mentioned in that behalf such unfounded coupons in arrear and the coupons for such interest in arrear on such interest certificates, including the coupons representing said sum of seventeen dollars and fifty cents ($17.50) before mentioned in that behalf, and thereupon cancelling such coupons so paid and taken up. And, inasmuch as it is contemplated that the said two sums of seven hundred and eighty-one thousand four hundred and twenty-seven dollars and fifty cents ($781,427.50) and two hundred and seventy-two thousand five hundred and ten dollars and eighty-eight cents ($272,510.88) which the said railway company is above decreed presently to pay will be advanced for or loaned to it for the purpose of meeting such payments by certain parties interested in said company, but not personally liable for its obligations under the expectations that the holders of the unfunded bond coupons and halves of coupons and of the overdue coupons of interest certificates on which it is to be applicable will consent to receive, in satisfaction of such overdue coupons and halves of coupons, whether of bonds or interest certificates, the amount of the face thereof, and thereupon surrender such coupons and halves of coupons as extinguished and cancelled, not making but relinquishing any claim for interest upon the amount of such overdue coupons and halves of coupons after maturity, and that in respect of all the sums so paid for back interest, excepting sums paid for the three years back interest upon the interest certificates representing the bond coupons for thirty-five dollars ($35), each due November 1st, 1873, and May 1st, 1874, and which interest certificates are commonly designated as certificates A and AA, the parties to whom such back interest shall be so paid shall, for and in respect of each sum of one hundred and fifty-two dollars and sixty-two cents ($152.62) which shall be so
79 paid to them respectively for back interest, give or have already given, their assent, as holders, respectively, of one of the said Denver extension bonds for one thousand ($1,000) dollars, with all the coupons thereon maturing on and after January 1st, 1879, and as holder of one funded interest certificate for eighty-seven dollars and fifty cents ($87.50), representing the funded halves of the five coupons upon one such bond which matured from November 1st, 1874, to November 1st, 1876, both inclusive, to the terms and conditions of the bondholders' agreement, dated April ninth, 1879, made between the Kansas Pacific Railway Company and certain of its bondholders, which is deposited with the United States Trust Company of New York, and as such bondholders became, or have become, parties to said bondholders' agreement by subscribing the same, and that in respect

of the sums so paid for the said three years' back interest upon the said interest certificates, designated as A and AA, the parties receiving such payments shall, as holders of the said interest certificates A and AA, on which they so received the back interest, assent, or have assented, to the said bondholders' agreement, and become, or have become, parties thereto by subscribing the same, the more material terms and conditions of the said bondholders' agreement being as follows, viz: The reduction of the rate of interest on said bonds from and after January first, 1879, from seven per cent. to six per cent. per annum, the waiver of any right on behalf of such assenting bondholders to declare or cause the principal of such bonds respectively to be now presently due and payable by reason of any default in interest which has heretofore occurred, the agreement to accept the payment of fifty dollars on November first, 1879, in full satisfaction and discharge of the two bond coupons for thirty-five dollars ($35), each due May first and November first, 1879, and the waiver of the right to declare or treat the capital of the now outstanding interest certificates representing the funded or deferred interest held by the subscribers to said agreement respectively as presently due and payable by reason of any default which has heretofore
80 occurred in payment of interest on such interest certificates, it is hereby decreed and directed that in making payment and distribution of the above-mentioned sums of seven hundred and eighty-one thousand four hundred and twenty-seven dollars and fifty cents ($781,427.50) and two hundred and seventy-two thousand five hundred and ten dollars and eighty-eight cents ($272,510.88), above directed to be paid to it in the settlement of overdue interest as aforesaid, the said The United States Trust Company do for the present make such payments in settlement of such overdue coupons and halves of coupons whether on bonds or interest certificates as aforesaid, to such parties only as will consent to accept the same and surrender the coupons and halves of coupons to the amount paid, with waiver and relinquishment as aforesaid of any claim for interest on the amount of such coupons after their maturity, and as shall further give or have given their assents and become subscribers to the said bondholders' agreement, as holders of the amounts of bonds and interest certificates respectively in such proportion to the respective amounts so paid to them respectively for back interest as are above recited to be intended or contemplated in that behalf, and that as to the residue of said amount in the hands of the United States Trust Company for distribution and payment, which the parties who would otherwise be entitled to receive the same decline to accept upon and with such terms and conditions, the said The United States Trust Company withhold such amounts from present payments and application, and retain the same in their hands subject to the future orders and directions of this court in respect thereof, leave being given to the parties from whom the same is so withheld on account of such refusal on their part as to the terms of acceptance to apply to this court upon petition and on notice to the complainant and the said railway company for such order and direction in respect to the

payment or application thereof and the terms and conditions
81 on which they shall be allowed to receive the same as they may be equitably entitled to and as this court may see fit to direct.

And in case the said railway company shall fail to make or cause such payment to be made to the United States Trust Company within the said twenty days, then all and singular the railroad appurtenances and equipment, and all the other properties, franchises, rights, and things embraced in and covered by the said Denver extension mortgage, save and except the lands not forming part of the railroad or roadway and appurtenances acquired or to be acquired by the said railway company under and in pursuance of the land grant from Congress in aid of the construction of said road, shall be sold at public auction to the highest bidder at the city of Topeka, in the State of Kansas, by or under the direction of Hiram P. Dillon, Esq., a master of this court, who is hereby appointed to make such sale in case the same has to be so made; that said master give public notice of the time and place of such sale by publishing the same for not less than four weeks prior to the sale, not less than twice in each week, in two newspapers published in the State of Kansas and two newspapers published in the city of New York, and in such other manner, if any, as may be required by law, and that the master as a condition of the sale require the purchaser or purchasers to pay to the master upon the property being struck down and sold to him or them a deposit, to be fixed by the master, of not less than five nor more than ten per cent. of the amount of the bid, to be applied upon account of the purchase upon its completion; that after making such sale the master make report thereof to this court, and that after an order shall have been made by this court confirming the sale the master execute and deliver to the purchaser or purchasers a deed of conveyance of the premises and properties, franchises, rights, and interests so sold, which it is adjudged and decreed shall be op-
82 erative and effectual to convey to and vest in said purchaser or purchasers the premises and properties, franchises, rights, and interests so sold, and all the estate, rights, and interests therein or claims thereon of all and each or any of the parties to this action, and of all parties holding or claiming under them or any of them subsequent to the commencement of this suit, and by such sale and conveyance all the equity of redemption and right, title, and interest whatever of all and each of the parties holding or claiming under them subsequently to the commencement of this suit as purchasers incumbrances or otherwise soever of or to or in respect of the premises, properties, franchises, rights, and things so sold and conveyed shall be asolutely and forever barred and foreclosed, saving and excepting, however, such rights as may appertain to the holders of said unstamped income bonds, amounting to two hundred and sixty-three thousand and seven hundred dollars ($263,700), and of the trustee of said income mortgage in their behalf and upon the execution and delivery of such deed of conveyance as aforesaid the purchaser or purchasers shall be let into possession of the premises and properties, franchises, rights, and interests so sold and conveyed, and the defend-

ants in this action and all parties claiming under them, or any of them, subsequently to the commencement of this action who may be in possession of the same or any part thereof, as well as the receiver in this suit in respect of any possession he may then hold, shall and hereby are respectively directed to deliver up such possession to the said purchaser or purchasers, and in case of failure to do so the purchaser or purchasers will be entitled to the aid of this court by writ of assistance or other appropriate means to put him or them in possession. And in case of such sale and conveyance being so made the master shall receive the purchase-money, and after paying thereout his own fees and charges and the expenses attending the sale, and such sums as the court shall, by future order, direct to be paid primarily out
83 of such proceeds for taxes or other liens or charges on the property sold, having priority over the Denver extension mortgage, shall apply the proceeds of such sale to or in equal *pro rata* proportion, so far as the same will go, towards the payment of all sums then owing or unpaid for principal or interest upon the bonds secured by said Denver extension mortgage, whether the same be then due and payable or yet to become due and payable, to all the parties respectively entitled to receive such principal or interest without preference or priority as between them, or of interest over principal, or *vice versa*, and whether such sums be so due to them respectively upon the bonds or upon the interest certificates representing them, but making any rebate of interest which may be proper if there be any proper case for such rebate, viz., of paying before due a sum not running at interest, if any such sum there should be, and if, after making full payment of all such principal and interest upon the bonds secured by said Denver extension mortgage, there shall remain a surplus of the proceeds of such sale the master shall bring such surplus into court to be subsequently applied and disposed of as the court shall direct, and in making any payments as before directed for principal or interest upon such bonds, coupons, or interest certificates secured by the Denver extension mortgage the master, if he makes a full payment, shall take up and cancel the bonds, coupons, and interest certificates with the original coupons represented by them, and if he makes only partial payment shall cause the amount of such payment to be stamped upon the securities so partially paid, and in such latter case shall take a duplicate receipt for the payment. And it is hereby adjudged and decreed as a reason, in case of such sale taking place, for directing present payment of the amounts secured by the said mortgage, though not yet due, in full or so far forth as the proceeds of the sale will suffice therefor, that the mortgaged property directed to be sold is an entirety which cannot be separated or sold in
84 parcels without very great prejudice and loss, nor without sacrifice of a large proportion of the actual and intrinsic and salable value thereof as an entirety.

The premises, properties, franchises, rights, and interests above decreed to be sold upon the contingency in that behalf above provided are described from the said indenture of mortgage or deed of trust as follows—that is to say:

All and singular the railroads and telegraph line or lines of the Kansas Pacific Railway Company constructed or to be constructed upon or over the line or route in the said indenture of mortgage mentioned, viz., from the Missouri river at the mouth of the Kansas river, on the south side thereof, and from Wyandotte to Denver, in Colorado; and the branch roads in the said indenture of mortgage mentioned, viz., from Leavenworth to a junction on the main line near Lawrence; and also all the lands, tenements, and hereditaments acquired or appropriated and which may hereafter be acquired or appropriated for the purpose of a right of way for said railway, and all the easements and appurtenances thereunto belonging or in anywise appertaining, and all railways, ways, and rights of way, depot grounds, tracks, bridges, viaducts, culverts, fences, and other structures, depots, station-houses, engine-houses, car-houses, freight-houses, wood-houses, warehouses, machine-shops, workshops, superstructures, erections, and fixtures, whether now held or hereafter at any time acquired, for the use of said railway or in connection therewith or the business thereof; also all locomotives, tenders, cars, and other rolling-stock or equipment, and all rails, ties, chairs, and machinery, tools, implements, fuel, and materials whatsoever for or in respect of the constructing, operating, repairing, or replacing said railway or any part thereof, or convenient or necessary for use for the purposes thereof, whether held and owned at the time of the making of said mortgage or thereafter acquired by said Kan-
85 sas Pacific Railway Company, or by the receiver or receivers thereof, together with all the equipments or appurtenances whatsoever thereunto belonging, whether then held or thereafter acquired, and all franchises connected with or relating to said railway and said line or lines of telegraph, or the construction, maintenance, or use thereof, then held or thereafter acquired by said Kansas Pacific Railway Company, and all corporate franchises of any nature relating thereto, including the franchise to be a corporation and operate said railway, which were then or thereafter possessed or exercised by the said Kansas Pacific Railway Company, together with all and singular the endowments, income, and advantages, tenements, hereditaments, and appurtenances to the above-mentioned lands, railroad premises, or property belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues, and profits thereof; and also the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, present or prospective, of the said Kansas Pacific Railway Company of, in, and to the same and every part and parcel thereof, with the appurtenances thereunto belonging.

It is hereby provided and expressly declared that the residue of the premises embraced in and conveyed by the said indenture of mortgage and deed of trust of June twentieth, 1869, and which are not to be included in the sale hereby directed—that is to say, the lands not forming a part of the roadway or appurtenant thereto, to which the said The Kansas Pacific Railway Company became entitled under and by virtue of the land grants of the Congress of the

United States, in the said indenture of mortgage mentioned or referred to, are to remain unaffected by this decree, and the said lands and the proceeds thereof are to be held, disposed of, and applied by the complainant and his successors or successor in the trust, and his associate trustee or trustees, if any such there shall at any time
86 hereafter be, under and in accordance with the terms and provisions of the said indenture of mortgage or deed of trust in that behalf as fully and completely as if this decree had not been made and this suit had not been instituted.

Sixth. That in case the defendant, The Kansas Pacific Railway Company, shall pay or cause to be paid over to the United States Trust Company the sums of seven hundred and eighty-one thousand four hundred and twenty-seven dollars and fifty cents ($781,427.50) and two hundred and seventy-two thousand five hundred and ten dollars and eighty-eight cents ($272,510.88), hereinbefore ordered to be so paid within twenty days, to be applied as aforesaid to the payment of the said amounts which are secured under said mortgage to the complainant, and now presently due and payable as aforesaid, this decree shall stand as a security to the complainant as trustee, and his successor or successors and his associate or associates, if any, in the trust, and to the holders for the time being of the bonds, coupons, and interest certificates entitled to the benefit of the security of said mortgage for the due payment and discharge of all sums of principal and interest subsequently becoming or being due and payable, and entitled to the benefit of the security of the said indenture of mortgage and deed of trust, whereof the complainant is now trustee, and to such end and effect as that, in case any of such sums which shall subsequently become or be due and payable shall remain in arrear and in default, subsequent proceedings may be taken as upon the foot of this decree and in manner hereinafter provided for enforcing the lien and security of said indenture or mortgage and deed of trust for the security and satisfaction thereof by means of sale or renewal of receivership, or both, or otherwise, as hereinafter provided.

And it appearing to the court that arrangements have been made between the said The Kansas and Pacific Railway Company and the holders of a large majority in amount of the bonds & coupons & interest certificates secured under said Denver extension mortgage, by the terms of which arrangement said assenting bondholders, constituting more than the majority required for that purpose
87 by the terms of the mortgage deed, agree upon compliance by the railway company with the primary conditions of such arrangement to waive and instruct the trustee to waive all present right on their part to declare and cause the principal of said Denver extension bonds to be presently due and payable by reason of such defaults as have hitherto occurred in respect of the payment of the interest thereon, and likewise to reduce the rate of interest from and after January first, eighteen hundred and seventy-nine, upon the Denver extension bonds held by the bondholders assenting to such arrangement, from seven per cent. per annum to six per cent. per annum, and to waive and relinquish the two months' interest

accrued on their said bonds from November first, 1878, to January first, 1879, and to receive, on November first, 1879, in full for two coupons on their said bonds maturing May first, 1879, and November first, 1879, fifty dollars per bond, being interest at the rate of six per cent. per annum from January first, 1879, to November first, 1879, and to waive, in respect of the interest certificates held by them, the right to declare or cause the principal of such certificates to be presently due by reason of such defaults as have hitherto occurred in respect to the payment of the interest thereon, and that, as part of the same arrangement, the said railway company has made, executed, and delivered to said John A. Stewart, as sole remaining trustee under said mortgage and deed of trust dated June twentieth, 1869, an instrument supplementary thereto dated April ninth, 1879, whereby said railway company agrees to pay to said John A. Stewart as such trustee, or his successors or successor, together with his or their associate or associates in the trust, if any there shall hereafter be, the sum of one hundred thousand dollars ($100,000) per year on the first day of July in each of the nine successive years commencing with and making such first payment on the first day of July, 1880, and thereafter the sum of two hundred and fifty-five thousand
88 dollars ($255,000) per year in each of the ten next succeeding years—that is to say, from July first, 1889, to July 1st, 1898, both inclusive—by way of a sinking fund for the redemption and ultimate satisfaction of the principal of the said now outstanding Denver extension bonds and Denver extension interest certificates, which sums thus paid to or for such sinking fund, with the income and increase derived therefrom and from the investments and accumulations thereof, are to be applied by said trustees for the time being for the ultimate redemption of the principal of said now outstanding Denver extension bonds and interest certificates in the manner and subject to the regulations and provisions in the said supplementary instrument declared and agreed in that behalf, a copy of which instrument is filed in this cause, and that further and as part of the same arrangement the said Kansas Pacific Railway Company has agreed with such bondholders who are parties to said arrangement that said railway company will upon the entry of this decree, or within twenty days thereafter, pay the sum of one hundred and twenty-five thousand dollars ($125.000) to Louis H. Meyer, August Rutten, and William Endicott, junior, a committee of three appointed by and having charge of the interest of certain of said Denver extension bondholders who have heretofore deposited their bonds for certain agreed purposes with the United States Trust Company of New York, which sum of one hundred and twenty-five thousand dollars ($125.000) is to be so paid by said railway company by depositing the same in the United States Trust Company of New York to the credit and subject to the order of said Louis H. Meyer, August Rutten, and William Endicott, junior, as such committee, and which sum of one hundred and twenty-five thousand dollars ($125.000) is to be used and applied by said committee in their discretion, subject only to such agreements or arrange-

ments in that behalf as they may heretofore or hereafter have entered into in meeting the following-named claims, charges, and expenses or such of the same or such part thereof as the committee shall deem fit or shall have agreed or arranged to pay out
89 of the same—that is to say: the counsel fees and legal expenses of this suit on behalf of the complainant, John A. Stewart, as trustee, and on behalf of such of the bondholders and bondholders' committee as have aided in the prosecution of this suit and in the protection, care, and charge of the interest of the Denver extension bondholders in respect of their bonds and the mortgage security therefor; the compensation and expenses up to this time and now remaining unpaid of John A. Stewart as trustee, as aforesaid; the compensation and expenses of the said committee of three and likewise of the general German committee, of which Dr. Braunfels is chairman, as well as the N. York committee of nine, who have had care and charge of the interests of certain of the said Denver extension bondholders; the compensation and expenses of the United States Trust Company for and in respect of their action under the arrangement upon which certain of the Denver extension bonds have been deposited with them and are held subject to the control of the said committee of three for certain agreed purposes, and any other charges or expenses the providing for which is or shall be within the duties or power of the said committee of three, it being understood and agreed that the said Kansas Pacific Railway Company has and will have no right or title in anywise to interfere or concern itself with nor to call for any accounting concerning the use or application by said committee of three of said sum of one hundred and twenty-five thousand dollars ($125,000).

Now, in pursuance of the arrangements aforesaid, it is further ordered, adjudged, and decreed that the said The Kansas Pacific Railway Company do, upon the entry of this decree, or within twenty days thereafter, pay or cause to be paid the said sum of one hundred and twenty-five thousand dollars ($125,000) to said Louis H. Meyer, August Rutten, and William Endicott, junior, as such committee, by depositing the same in the United States Trust Company of New York to their credit, to their order, which
90 sum, when so paid, shall be subject to be used and applied by said committee or their successors, in case any change shall take place in the composition of such committee, for the uses and purposes and in the manner and subject to the provisions hereinbefore mentioned in that behalf.

And it is further ordered, adjudged, and decreed that in case the said Kansas Pacific Railway Company shall within twenty days from the entry of this decree pay, in compliance with the foregoing directions in that behalf, the sums above decreed to be paid by it within such period—that is to say, the respective sums of seven hundred and eighty-one thousand four hundred and twenty-seven dollars and fifty cents ($781,427.50) and two hundred and seventy-two thousand five hundred and ten dollars and eighty-eight cents ($272,510.88) and one hundred and twenty-five thousand dollars ($125,000)—then, upon the completion of such payments by said railroad company,

the present receivership in this suit shall be terminated and discharged, and Sylvester T. Smith, the present receiver, shall thereupon surrender and deliver up to the Kansas Pacific Railway Company the railroad, appurtenances, equipments, and all other the property held by him as receiver, excepting such cash balance as may be in his hands and excepting the lands held under the land grant from Congress and not forming part of the said road or appurtenances, and which are embraced in the land trust created by the said indenture of mortgage and deed of trust of June 20, 1869, as to which lands so embraced in the said land trust the receiver is to relinquish such lands to the trustee or trustees of said land trust so far as by the terms and conditions of the said land trust he or they may be entitled thereto, and to said railroad company such possession or control in respect thereof, if any, as by and under the terms and conditions of said indenture of June 20, 1869, said railway company may be entitled unto; and said Sylvester T. Smith shall also, without delay, render his accounts as receiver,
91 which shall be referred to and passed by said Hiram P. Dillon, Esq., as master, hereby appointed for the purpose; and, upon the receiver's accounts being passed by said master and the master's report thereon being approved by order of this court, the receiver shall pay over to the Kansas Pacific Railway Company such cash balance as by such accounts thus passed and approved *as* shall appear to be in his hands or due by him, and thereupon shall be discharged from future responsibility or accountability as receiver, and his bond, with sureties given by him as security for the performance of his duties and for accounting as such receiver, shall be thereupon by the clerk of this court delivered up to him cancelled: Provided, however, That if at the time when it is above directed that the receiver shall surrender and deliver up to the railway company the property, other than cash on hand, embraced in the receivership, the receiver shall claim that the cash balance remaining in his hands is not sufficient to cover any amount he may claim to be due to him from the trust and to indemnify him against any outstanding responsibilities against him as such receiver, and if the said railway company shall not make provisions satisfactory to him for meeting such indebtedness to him and for his indemnity against such responsibilities, the said receiver shall be entitled, before actually surrendering or delivering up, as aforesaid, the railroad and other property embraced in the receivership, to apply to this court by petition, upon notice to the railway company, setting forth his claims in respect of indebtedness and outstanding responsibilities and the amount of cash in his hands, as nearly as may be, to the end that the court may fix and direct such further provision to be made, in cash or its equivalent, to cover the receiver's claims of indebtedness against the trust and for indemnifying him against outstanding responsibilities as to the court may seem fit.

And in case the Kansas Pacific Railway Company shall pay or cause to be paid the sums hereinbefore decreed to be now
92 presently due and payable for interest upon said Denver extension bonds and interest certificates, viz., the respective

sums of seven hundred and eighty-one thousand four hundred and twenty-seven dollars and fifty cents ($781,427.50) and two hundred and seventy-two thousand five hundred and ten dollars and eighty-eight cents ($272,510.88) and said sum of one hundred and twenty-five thousand dollars ($125,000) and consequently the provisions and direction hereinbefore contained for sale of the railroad and other mortgaged premises in order to raise the amount requisite to pay such sums respectively now due and payable shall fail of actual effect or cease to be operative and effective, or if in anywise it shall so happen that such sale above directed shall not take place, then it is further ordered, adjudged, and decreed that this suit and the proceedings therein, including this decree, shall stand and be in force and effect by way of security for and subject to be hereinafter proceeded with and upon for the collection and satisfaction of all such sums as at any time or from time to time hereafter may become or be due and payable for interest or principal, or both, upon any or all of the outstanding bonds, coupons, and interest certificates which are or shall be entitled to the benefit of the security of said Denver extension mortgage; and if, at any time hereafter, any such principal or interest shall become or be due and in arrear and unpaid, and shall have remained in arrear for sixty days, and whether such interest be at the reduced rate of six per cent. to a bond or coupon holder whose securities are embraced in and subject to the arrangement for reduction of the rate of interest hereinbefore mentioned or be at the original rate of seven per cent. to a bond or coupon holder whose securities are not subject to the effect of said arrangement, the said complainant, John A. Stewart, as trustee as aforesaid, or his successor or successors in the trust, with his or their associate trustee or trustees, if any such there be—that is
93 to say, the trustee or trustees for the time being under the said Denver extension mortgage—shall be entitled to apply to this court as upon the foot of this decree, either by petition or as upon the the equity reserved or by supplemental bill, or in any other manner which may be appropriate for such relief and such remedy or remedies as may in such case be appropriate for the security of the respective holders of the Denver extension bonds and the coupons and interest certificates thereof respectively, and for the collection of such sums of interest or principal, or both, then due and in arrear, including the principal, if it shall then be legally due in consequence of election to that effect of a majority in interest of the bondholders, by reason of default in interest occurring subsequently to this decree or otherwise, and also in case the arrears be not paid without a sale taking place for the collection of all sums then owing or unpaid upon such Denver extension bonds and interest certificates respectively, or either of them, although the same may then be not due, but yet to become due; and in such case if it shall be proper, by reason of changes having subsequently to this decree taken place in either parties or legal interests, to bring before the court any new party or parties, either complainant or defendant, or both, or any supplemental matters to the end that all proper remedies may be afforded and all rights duly maintained, and a proper decree be made upon the then existing

state of facts, such new party or parties and such supplemental matters may be brought before the court in this suit, by supplemental bill or bills of that nature, or in such other manner or form as may be proper.

And it is hereby declared and adjudged that in any such case as aforesaid of interest or principal, or both, upon said Denver extension bonds and coupons and interest certificates, or either of them, becoming or being presently due and payable and remaining in arrear and unpaid for sixty days as aforesaid, the trustee or trustees
94 for the time being of said Denver extension mortgage will, and shall be entitled, upon making application therefor, to the court to an order of this court in this suit renewing the receivership of the said railroad and appurtenances and equipments and other mortgaged premises and the income thereof, and to the appointment of a new receiver of the same, with appropriate direction to such receiver in that behalf, and likewise unless such arrears be then promptly paid by the said railway company to a decree in this suit for the sale of the said railroad appurtenances and equipments and other mortgaged properties, premises, franchises, rights, and interests by such master, and in such manner as the court may then appoint and direct, and for due application of net proceeds of such sale to, or so far as the same will go towards the payment and satisfaction of the principal and interest of said Denver extension bonds and the coupons and interest certificates thereof, whether the same be then presently due and payable or yet to become due and payable, and for foreclosure of the equity of redemption of the defendants respectively, and of all persons claiming or holding under them or any of them subsequently to the commencement of this suit in or in respect of what shall be sold with all other appropriate orders and directions in the premises, provided, however, that if any such sale be so decreed such sale shall not actually take place before the expiration of at least twelve months from the entry of such decree of sale, which period of delay in sale, in case of subsequent default as aforesaid, has now been fixed or agreed upon between the parties to the arrangement hereinbefore mentioned, in order to afford to the said bondholders, in case of such contingency, adequate time for combining and arranging for the due protection of their interests as affected by such sale; and in case at any time when, according to the foregoing provisions of this decree, the trustee or trustees for the time being of the Denver extension mortgage shall be entitled to apply for renewal of the re-
95 ceivership and for the sale of the said appurtenances and equipment and other mortgaged premises, properties, rights, and franchises by reason of principal or interest being in arrear and remaining unpaid as aforesaid in said trustee or trustees, shall refuse or neglect to take such proceedings in that behalf as he or they shall be so authorized to take any bondholders or coupon or interest certificate holders claiming to be aggrieved by such refusal or neglect of the trustees, may make application to the court, upon due notice to all parties to the suit, for leave to intervene in the suit and for such relief in that behalf as to the court may seem just

And it is further declared and adjudged that in case it shall, at any time hereafter, appear upon any contingency or event arising or being manifest that the reservations hereby made of rights and remedies on behalf of the holders of said Denver extension bonds, coupons, and interest certificates or of their trustee or trustees on their behalf for securing and collecting such amounts of interest or principal, or both, as hereinafter may become or be due and in arrear to them, and as shall remain in default as aforesaid by means of such proceedings in this suit, and as upon the foot of this decree, as are hereinbefore authorized, cannot be made practically available for the due protection and enforcement of the rights and equities of said parties in that behalf, this suit and decree shall not take away nor prejudice any equitable right which such trustee or trustees, or, in case of his or their refusal or neglect, such bondholders or coupons or interest- certificates holders may have to proceed by original suit in equity in this court, to which at least the said railroad company and the trustee or trustees for the time being of the Denver extension mortgage shall be parties, as well as all other proper parties for the protection and due security and enforcement of the equitable rights and remedies of such bond, coupon, or cer-
96 tificate holders or their trustee or trustees in their behalf in respect of such amounts of principal or interest, or both, so in arrear and in default, and the mortgage security therefor, and which it shall then be made to appear to the court cannot be justly and adequately done in this suit by proceedings as at the foot of this decree as aforesaid.

And it is further ordered, adjudged, and decreed that in case any decree shall hereafter be made adjudging any sum to be presently due and payable to the holders of said unsubordinated income bonds and to have priority over the Denver extension mortgage upon any of the property covered by or embraced in that mortgage and directing a sale of any such property for the satisfaction thereof of the said Kansas Pacific Railway Company or its successors shall not, within three months from the rendition of said decree, satisfy and discharge such decree, so as to relieve such property from jeopardy of sale thereunder, the trustee or trustees for the time being of the Denver extension mortgage, or any of the bondholders, in case of their neglect, shall be thereupon entitled to apply for and obtain, upon due notice to all proper parties, a renewal of the receivership in this suit in order to raise funds from the income of the mortgaged premises for the satisfaction and discharge of the amount adjudged as such prior lien under the income mortgage, and to relieve such property from jeopardy of sale under such decree in like manner and with like effect, as far as may be, as is provided in case of default in the payment of interest or principal hereafter becoming or being due which is secured by the Denver extension mortgage.

And it is further declared and decreed that this decree is made without prejudice to such rights or equities, if any, as any of the holders of bonds, coupons, or interest certificates secured under the Denver extension mortgage who may decline to assent to the

terms and conditions of the before-mentioned arrangement
97 between the Kansas Pacific Railway Company and the assenting holders may have or be entitled to *to* have — any decree or provision made in their behalf beyond what is contained in this decree, and if any of such parties shall claim to be equitably entitled to have such further decree or provision made they may apply therefor to this court upon petition and upon notice to the respective parties to this suit for such further decree or relief in that behalf as may be proper.

And it is further ordered and decreed that this decree is made without prejudice to any defence which the defendant company or the trustees of the funding mortgage and the bondholders secured thereby may have to said income mortgage and bonds.

C. G. FOSTER, *Judge.*

Indorsed: No. 1894. U. S. circuit court for the district of Kansas. John A. Stewart *vs.* The Kansas Pacific Railway Company *et al.* Decree. Filed June 4, 1879. A. S. Thomas, clerk, by J. N. Strickler, deputy. B. W. Lewis, Jr., J. W. Green, att'ys for plaintiff.

Indorsed: 4407. Benjamin W. Lewis, Jr., *vs.* The Kansas Pacific Railway Company *et al.* Dismissal of cause by plaintiff. Filed June 8, 1880. B. D. Palmer, clerk.

And afterwards, to wit, on the 13th day of January, 1881, the plaintiff filed his amended reply, which is in words and figures following, to wit:

In the District Court of Douglas County, State of Kansas.

BENJAMIN W. LEWIS, JR., *vs.* KANSAS PACIFIC RAILWAY COMPANY

And now comes the said Benjamin W. Lewis, Jr., and by leave of the court files this his amended reply to the amended answer of said Kansas Pacific Railway Company and states:

1st. That he denies each and every the allegations in said amended answer of said company contained.

98 2nd. That at the time of the making of the agreements mentioned and set out in the amended and further answer of said company and annexed to said answer as Exhibit A & Exhibit B, as also at the time of the making of the agreement mentioned in said answer, as made by said defendant company on the 1st day of October, 1866, and annexed to said answer as Exhibit C, all the stockholders of said company, without exception, well knew of said agreements above mentioned and forming said Exhibits A, B, & C, and each of them assented thereto and approved of the same, and said Kansas Pacific Railway Company is estopped from now questioning the legality or validity of said contracts set out in said exhibits or either of them.

3rd. That since the making of said income mortgage by said Kansas Pacific Railway Company, then called the Union Pacific Railway Company, Eastern Division, bearing date July 1st, 1866, down to the 4th day of June, 1879, the said Kansas Pacific Railway Com-

pany ratified, assented to, and set up said income mortgage and the bonds secured thereby, the said income mortgage as a good and valid deed and a subsisting incumbrance against said company and its property described therein, and the bonds secured thereby as good, valid, and binding obligations of said company, and that in various ways and at sundry times from the making and executing the same down to the 4th day of June, 1879; and particularly the said company recognized, ratified, and affirmed said income mortgage and the bonds secured thereby by and in a certain mortgage deed of said company dated the twentieth day of June, 1869, made originally to J. Edgar Thompson, Adolphus Meier, and John A. Stewart, called the Denver extension mortgage.

4th. That after so great a lapse of time from the making of said income mortgage by said Kansas Pacific Railway Company and the disposing of said income bonds, shortly after the date thereof, before any action of said company alleging any supposed invalidity
99 of said income mortgage or the bonds secured thereby, that it would be grossly inequitable to allow said company to question the same, and the said Lewis sets up and relies upon the great laches of said company in the premises as a full and perfect defence to the alleged counter-claim of said Kansas Pacific Railway Company.

5th. And for a further defence the said Benjamin W. Lewis, Jr., says that before he commenced this suit he was made party defendant in a suit brought in the circuit court of the United States for the district of Kansas, as trustee of said income mortgage in and about the property mentioned in said income mortgage by Adolphus Meier and John A. Stewart originally, and continued in the name of John A. Stewart alone, against said Kansas Pacific Railway Company and others, and that in the course of the proceedings in said suit and on the 4th day of June, 1879, by the judgment and decree of said circuit court of the United States, the said Benjamin W. Lewis, Jr., was perpetually enjoined and restrained, as trustee, from taking, continuing, or carrying on any legal proceedings other than in the said circuit court of the United States in a suit in which the trustee or trustees of the Denver extension mortgage (to foreclose which said suit was brought) should be made parties defendant, and that in pursuance thereof said Lewis did on the — day of June, 1880, dismiss this suit, and said Lewis sets up said injunction and said judgment issuing from said circuit court of the United States in said suit, in which said Kansas Pacific Railway Company was a party defendant, as estopping said company from further prosecuting its alleged counter-claim after the dismissal of said suit by said Benjamin W. Lewis, Jr., against said company.

6th. And for a further defence the said Lewis states that the said bonds secured by the said income mortgage had been long before the institution of said suit of said Lewis against said Kansas Pacific
100 Railway Company, and now are, held by divers innocent purchasers of the same from the persons to whom they were originally issued by said company for full value paid by said purchasers to said original holders without any knowledge or notice

that said bonds were issued without consideration or that they were not in all respects valid and legal bonds of said company.

J. W. GREEN,
J. R. SHEPLEY,
LUCIEN EATON,
Attorneys of B. W. Lewis, Jr.

Endorsed: 4407. District court, Douglas county. B. W. Lewis, Jr. *vs.* Kansas Pacific Railway Co. Amended reply. Filed Jan'y 13, 1881. M. Summerfield, cl'k.

Afterward, to wit, on said 13th day of January, 1881, the said plaintiff filed his petition, affidavit, and bond for the removal of this action to the circuit court of the United States for the district of Kansas in words and figures following, to wit:

State of Kansas, District Court, Douglas County.

BENJAMIN W. LEWIS, Jr., *vs.* THE KANSAS PACIFIC RAILWAY COMPANY. } 4407.

To the district court of Douglas county, State of Kansas:

Your petitioner, Benjamin W. Lewis, Jr., respectfully shows that he is plaintiff in the foregoing-entitled suit, and that the same was by him commenced on or about the 29th day of June, A. D. 1878, in said court; that your petitioner was at the time of bringing said suit, and still is, a citizen of the State of Missouri and a resident thereof.

Your petitioner further shows that there is and was at the time said suit was brought a controversy herein between your petitioner and said defendant, The Kansas Pacific Railway Company,
101 which was and is a citizen of the State of Kansas and a resident thereof; that said action was brought by your petitioner for the purpose of enforcing and foreclosing a certain income mortgage mentioned in the petition and of enforcing the payment of certain bonds therein mentioned, and the defendant therein seeks to have said mortgage and bonds annulled and the bonds surrendered to it; and that the matters in dispute in this suit exceed the sum of five hundred dollars, exclusive of costs.

Your petitioner further represents that this suit has not been tried, but is now pending for trial in the district court of the State of Kansas for said county of Douglas, and that your petitioner desires to remove the same into the circuit court of the United States for the district of Kansas, in pursuance of the act of Congress in that behalf provided, to wit, the Revised Statutes of the United States, section 639, subdivision 3.

Your petitioner further says that he has filed the affidavit required by the statute in such cases, and offers herewith his bond executed by Chas. Chadwick, of Lawrence, Kansas, as surety, together with Lucien Eaton, in the penal sum of two hundred and fifty dollars, conditioned as by said act of Congress required.

Your petitioner therefore prays that said bond may be accepted as good and sufficient, according to said act of Congress, and that said suit may be removed into the next circuit court of the United States in and for said district of Kansas, pursuant to the act aforesaid of Congress in such case made and provided, and that no further proceedings may be had therein in this court.

And your petitioner will ever pray, &c., &c.,

B. W. LEWIS, JR.

JOHN R. SHEPLEY, *Attorney.*

Endorsed: 4407. State of Kansas, Douglas county. B. W.
102 Lewis Jr., *vs.* Kansas Pacific Railway Company. Petition by plaintiff for removal to U. S. C. court. Filed Jan'y 13, 1881. M. Summerfield, cl'k.

Affidavit.

In the District Court, Douglas County, State of Kansas.

BENJAMIN W. LEWIS, Plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, Defendant.

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Benjamin W. Lewis, being duly sworn, do say that I am the plaintiff in the above-entitled cause; that I have reason to believe and do believe that from prejudice and local influence I will not be able to obtain justice in said State court.

B. W. LEWIS.

Subscribed by said Benjamin Lewis in my presence and by him sworn to before me, at said city of St. Louis, this 23rd day of December, A. D. 1880, as witness my hand and official seal.

Qualified August 20th, 1878, for a term ending Aug. 20th, 1882.

[L. S.] EMIL GESSLER,
Notary Public, City of St. Louis, Mo.

Endorsed: 4407. State of Kansas, Douglas county, district court. B. W. Lewis *vs.* Kansas Pacific Railway Co. Affidavit for removal. Filed Jan'y 13, 1881. M. Summerfield, cl'k.

Know all men by these presents that we, Benjamin W. Lewis, Jr., as principal, and Lucien Eaton and Chas. Chadwick, as sureties, are held and firmly bound unto the Kansas Pacific Railway Company in the penal sum of two hundred and fifty dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, jointly & severally, by these presents.

The condition of this obligation is such that if Benjamin W. Lewis, Jr., shall enter and file or cause to be entered and filed in the next circuit court of the United States in and for the district of
103 Kansas, on the first day of its session, copies of all process-, pleadings, depositions, testimony, and other proceedings in a

certain suit now pending in the district court of Douglas county and State of Kansas, in which Benjamin W. Lewis, Jr., is plaintiff and The Kansas Pacific Railway Company is defendant, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into said United States court, then this obligation to be void; otherwise of full force.

Dated January 10th, A. D. 1881.

B. W. LEWIS, JR. [SEAL.]
LUCIEN EATON. [SEAL.]
CHAS. CHADWICK. [SEAL.]

STATE OF KANSAS, } ss:
County of Douglas, }

I, Charles Chadwick, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Kansas and a property holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in the State of Kansas liable to execution of the value of more than five hundred dollars.

CHAS. CHADWICK.

Subscribed in my presence by Charles Chadwick, and by him sworn to before me at Lawrence, this 12th day of January, A. D. 1881, as witness my hand and notarial seal.

[L. S.] JAMES M. HENDRY,
Notary Public.

Endorsed: 4407. State of Kansas, Douglas county, district court. B. W. Lewis, Jr., *vs.* Kansas Pacific Railway Co. Bond for removal. Filed Jan'y 13, 1881. M. Summerfield, cl'k.

Afterward, on the 13th day of January, A. D. 1881, at the October term of this court, 1880, among others the following proceedings were had, to wit:

104 BENJ. W. LEWIS
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, and THE KANSAS PACIFIC RAILWAY COMPANY. } 4407.

Now come the parties plaintiff and defendant, by their attorneys, and the plaintiff thereupon presents to the court his petition and affidavit for the removal of this suit from this court to the circuit court of the United States for the district of Kansas, together with his bond, with a good and sufficient surety, conditioned in accordance with law; and said petition having been heard and considered by the court, it is ordered that this suit be removed to the circuit court of the United States for the State of Kansas, in accordance with the prayer of said petition.

Also, on the same day, January 13th, 1881, at the October term

(1880) of this court, among others the following proceedings were had, to wit:

BENJAMIN W. LEWIS
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, and THE KANSAS PACIFIC RAILWAY COMPANY.

On motion of said plaintiff it is ordered that said plaintiff have leave to file his amended reply, which was accordingly done.

STATE OF KANSAS, } *ss:*
County of Douglas, }

I, M. Summerfield, clerk of the district court within and for said county and State, do hereby certify that the above and foregoing is a full and complete transcript of all pleadings and papers, with the indorsements thereon, and all proceedings had in the within-entitled action as they are on file and appear on the records in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, on the 7th day of March, 1881.

[SEAL.] M. SUMMERFIELD, *Clk.*

[Endorsed:] No. 3437. Benj. W. Lewis *vs.* Adolphus Meier *et al.* Transcript. Filed May 28, 1881. A. S. Thomas, clerk, by W. W. Gealtt, deputy.

105 In the Circuit Court of the United States for the District of Kansas. June Term, 1881.

BENJAMIN W. LEWIS, —,
against
THE KANSAS PACIFIC RAILWAY, Defendant. } No. 3437.

And now comes the said Benjamin W. Lewis, plaintiff herein, and dismisses this action without prejudice to his bringing a new suit upon the cause of action set forth in said petition, and prays that said action be altogether discontinued and dismissed, together with and including the said alleged counter-claim as set up in the amended answer of said defendant, The Kansas Pacific Railway Company, & assigns the following reasons:

First. Because the plaintiff Lewis is enjoined and restrained by the judgment and decree of this court, in the case of John A. Stewart against the said Kansas Pacific railway, said Benjamin W. Lewis, & others, rendered on the fourth day of June, 1879, from the further prosecution of said action, which decree remains in full force, which last-named suit was commenced November 3rd, 1876.

Second. Because the said defendant, The Kansas Pacific railway, is by the same decree of the said circuit court of the United States for the district of Kansas, in the suit of John A. Stewart against said railway company, said Benjamin J. Lewis, & others, restrained & enjoined from further or other litigation in said cause after the entering of said judgment, which decree remains in full force, and which last-named suit was commenced November 3, 1876.

Third. Because said amended answer of said railway company, defendant, presents no counter-claim in said cause, and after the dismissal of said action by plaintiff presents no cause of action and no matter which can form the subject of further litigation herein.

J. W. GREENE,
GLOVER & SHEPLEY,
Att'y- for Pl'ff Lewis.

106 Endorsed: No. 3437. In the circuit court of the United States for the district of Kansas. Benjamin W. Lewis *vs.* The Kansas Pacific Railway Company. Motion to dismiss action. Glover & Shepley, J. W. Greene. Filed June 7, 1881. A. S. Thomas, clerk, by W. W. Gelatt, deputy.

107 June Term, 1881.

BENJAMIN W. LEWIS
vs.
ADOLPHUS MEIER *et al.* } 3437.

WEDNESDAY, *June* 8, 1881.

Now come the parties hereto, by their solicitors, and thereupon the defendants' motion to dismiss this suit came on to be heard and was argued by counsel, on consideration whereof it is ordered by the court that said motion be, and is hereby, overruled.

June Term, 1881.

BENJAMIN W. LEWIS
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, and THE KANSAS PACIFIC RAILWAY COMPANY. } 3437.

FRIDAY, *June* 10, 1881.

On motion of the defendant, the Kansas Pacific Railway Company, it is ordered by the court that it have until the first Monday in August, 1881, to replead.

108 Circuit Court of the United States, District of Kansas.

BENJAMIN W. LEWIS, Jr., Plaintiff,
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, and THE KANSAS PACIFIC RAILWAY COMPANY, Defendants.

To the judges of said court:

This cause having been removed into this court by the complainant, the defendant, The Kansas Pacific Railway Company, by leave of the court first had and obtained, files this its supplemental pleading in the cause to the end that the cause may proceed to a hearing in accordance with the rules and practice of courts of equity.

And the said railway company, hereinafter called complainant, states and shows to the court that on the days of their dates there was executed (in its name the three contracts set out in its answer

in this cause, filed Oct. 24, 1879, which contracts this complainant prays may be here read and considered and held to be a part of this pleading, the same as if here set out at length, and this complainant says that its board of directors were interested in said contracts and in the execution of the same and participated in the performance of said contract from first to last, and said contracts were intended to be and were a shift and device by which the directors of this company should be enabled to unite with others to construct the railroad, and with such others to have and enjoy the considerations stipulated for in said contracts, as more particularly described in the answers in this cause.

And complainant avers that said directors did unite with said contractors in the construction of complainant's railroad in the contract mentioned, and did participate with them in the receipt to their own use of the bonds, stocks, lands, and other property of complainant in said contracts mentioned, and did make and
109 secure to themselves large profits and advantages, as in said answers is stated, which advantages and profits were intended and contemplated at the time of the making of said contracts, and complainant says that after the making of the said contracts bearing date July 1, 1865, and after the railroad mentioned in said contracts to be constructed had been in a manner completed, the then directors of complainant company to advantage themselves determined to execute the mortgage and bonds in the petition of Benjamin W. Lewis, hereinafter to be styled defendant in this cause, mentioned and made exhibits, and did execute the same and caused said mortgage to be recorded in all of the then organized counties in Kansas in which complainants' railroad to be constructed under said contracts was located and did execute in the name of complainant the so-called income bonds in said mortgage specified and described, and did apportion and divide said bonds among themselves and other parties interested in accordance with their respective interests.

And complainant says that all of said so-called income bonds supposed and pretended to be secured by said so-called income mortgage were issued and delivered by the directors of complainant company in pursuance of contracts made by the directors of complainant on behalf of complainant, in which contract said directors were pecuniarily interested, out of which large profits were made by said directors, and that said directors so interested managed, controlled, and directed the corporation complainant and its affairs until after the commencement of this suit by said Lewis, now made defendant, which direction and control ceased soon thereafter.

And complainant refers to the former pleadings in this cause for a statement and description of said mortgage, bonds, and contracts, and the tenor and effect thereof, and prays that the same may be here read as a part of this pleadings, the same as if set out at length.

110 And complainant further avers that said defendant Lewis is now the sole trustee of said mortgage, said Meier and Greeley having resigned.

Complainant further avers that said mortgage was executed without authority and is illegal and void; that said so-called income bonds purporting to be secured by said mortgage were executed without any consideration to complainant therefor, and complainant refers to its answers in this cause for a further and more complete statement of the way and manner in which the same were issued and the occasion and reason therefor.

And complainant says that said mortgage, recorded as aforesaid, is a cloud upon the title of complainant to its property therein described, and ought to be cancelled of record and such cloud removed, all which said defendant Lewis well knew, but is without authority to cancel said mortgage of record, unless directed so to do by the decree of this court.

Complainant therefore prays that a decree may be entered in this cause declaring said so-called income mortgage to be illegal and void, and directing said defendant Lewis in apt words to enter upon the records in all places where said mortgage is recorded satisfaction of the same, so that the same shall no longer be an incumbrance or cloud upon the right and title of complainant in and to the property mentioned and described in said mortgage, and for such other order and decree in the premises as shall be just and as to the rules of equity doth belong.

J. P. USHER,
Solicitor for Complainant,
The Kansas Pacific Railway Company.

Endorsed: No. 3437. Benjamin W. Lewis *vs.* Adolphus Meier *et al.* Cross-bill of defendant K. P. R'l'y Co. Filed Aug. 1, 1881. A. S. Thomas, cl'k, by W. W. Gelatt, deputy. J. P. Usher, solicitor.

111 In the Circuit Court of the United States for the District of Kansas.

BENJAMIN W. LEWIS, Jr., Plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, Defendant.

DISTRICT OF KANSAS, *ss:*

And now comes the said Benjamin W. Lewis, Jr., and, for answer to the supplemental pleadings and bill filed in said suit by said Kansas Pacific Railway Company on the 1st day of August, 1881, and saving & reserving to himself at all times all & all manner of benefit of exception to the manifest errors, uncertainties, & imperfections in said cross-bill contained, says that he had nothing to do with the making of said income mortgage or of the bonds secured thereby and became trustee therein in the place of the original trustees, Adolphus Meier & Carlos S. Greeley, long after the making thereof; that he is ignorant as to making of the said contracts and whether the then board of directors were interested in said contracts or in the execution of the same or participated in the performance of said contracts or either of them, or whether they were a shift or device to accomplish the object stated in said cross-bill, but avers and in-

sists that if it were so (which he denies) it does not make the contracts void.

The said Benjamin W. Lewis, Jr., further answering, says that said railroad was constructed long before he became trustee under said income mortgage, and he is ignorant as to any participation of the directors composing said board or any of them in the construction of said railroad or in the receipt to their own use of the property of said railroad in said contracts mentioned, or whether they or any of them made out of said contracts large profits, nor for what reason the then board of directors of said company determined to & did execute the said income mortgage & the bond secured thereby, or whether the said directors apportioned the said bonds, or, if so, how it was done, and denies the same. As to the allegation and statement in said cross-bill contained that all of said income bonds
112 were issued and delivered by the directors of said railway company in pursuance of contracts made by the directors, in which contracts said directors were interested & made large profits, said Lewis is ignorant, but he avers and insists that if the same were true (which he denies) that neither the said mortgage nor the bonds secured thereby are void, and avers and insists that the making & issuing of said mortgage bonds & the making of the said income mortgage securing the same were of great benefit and value to said company & its stockholders, & without them said company would not have been enabled to complete said railroad.

Further answering, the said Benjamin W. Lewis, Jr., is informed and believes, and so states, that at the time of the making of the agreements mentioned and set out in the amended cross-bill, & of each of them, as set out in the answer to said cause, filed by said Kansas Pacific Railway Company on 24 October, 1879, all the stockholders of said company without exception well knew of said agreements above mentioned and forming said Exhibits A, B, and C, and each of them assented thereto and approved the same, and said Kansas Pacific Railway Company is estopped from now questioning the legality or validity of said contracts set out in said exhibits or either of them.

Further answering, the said Benjamin W. Lewis has been informed & believes, & so states, that since the making of said income mortgage by said Kansas Pacific Railway Company (then called the Union Pacific Railway Company, Eastern Division), bearing date from July 1st, 1866, down to June 4, 1879, the said Kansas Pacific Railway Company ratified, assented to, and set up said income mortgage and the bonds secured thereby, the said income mortgage as a good and valid deed and a subsisting encumbrance against said company and its property described therein, and the bonds secured thereby as good, valid, and binding obligations of said company, and that in various ways and at sundry times from the making and executing the same down to the 4th day of
113 June, 1879, *and* particularly the said company recognized, ratified, and affirmed said income mortgage and bonds secured thereby by and in a certain mortgage deed of said company dated 20th day of June, 1869, made originally to J. Edgar Thompson,

Adolphus Meier, and John A. Stewart, and called the Denver extension mortgage.

Further answering, & for a further defense to said claim, the said Benjamin W. Lewis says that, after the lapse of so great a time from the making of said income mortgage by said Kansas Pacific Railroad Company, and the disposing of said income bonds shortly after the date thereof, before any action of said company alleging any supposed invalidity of said income mortgage on the bonds secured thereby, *that* it would be grossly inequitable to allow said company to question the same, and the said Lewis sets up and relies upon the great laches of said company in the premises as a full and perfect defense to the alleged claim of said Kansas Pacific Railway Company.

Further answering, and for a further defense, the said Benjamin W. Lewis, Jr., says that before he commenced this suit he was made a party defendant in a suit brought in the circuit court of the United States for the district of Kansas as trustee of said income mortgage in or about the property mentioned in said income mortgage by Adolphus Meier and Jno. A. Stewart originally, and continued in the name of John A. Stewart alone, against said Kansas Pacific Railway Company and others, and that in the course of the proceedings in said suit and on the 4th day of June, 1879, by a judgement and decree of the said circuit court of the United States the said Benjamin W. Lewis, Jr., was perpetually enjoined and restrained as trustee from taking, continuing, or carrying on any legal proceedings other than in the said circuit court of the United States in a suit [in] which the trustee or trustees of the Denver extension mortgage (to foreclose which said suit was brought) should be
114 made parties defendant, and that in pursuance thereof said Lewis did, on the — day of June, 1880, dismiss this suit, and said Lewis sets up said injunction and said judgment issuing from said circuit court of the United States in said suit, in which said Kansas Pacific Railway Company was a party defendant, as estopping said company from further prosecuting its illegal counterclaim after the dismissal of said suit by said Benjamin W. Lewis, Jr., against said company, as is now here done.

Further answering, and for a further defense, the said Lewis states that the said bonds secured by said income mortgage had been long before the institution of said suit of said Lewis against said Kansas Pacific Railway Company, and now are, held by divers innocent purchasers of the same from the persons to whom they were originally issued by said company for full value paid by said purchasers to said original holders with the full knowledge by the said Kansas Pacific Railway Company of such sale being from time to time and constantly made and without any knowledge or notice that said bonds were issued without consideration, or that they were not in all respects valid and legal bonds of said company, or that said mortgage was not in all respects valid and legal, and said company are estopped from denying the validity of said bonds or the income mortgage securing the same.

Further answering, the said Benjamin W. Lewis, Jr., avers and

insists that the said income bonds & the said mortgage securing the same are both of them good, valid, subsisting instruments legally binding upon said Kansas Pacific Railway Company, and denies that the said income mortgage is any cloud upon the title to said company to the property in said mortgage described, or that said railway company is entitled to have the decree prayed for by it in said cross-bill or any decree in the premises, & prays that the same may be dismissed at the costs of said company.

GLOVER & SHEPLEY,
I. W. GREEN,
LUCIEN EATON,
115 *Sol'rs for the said B. W. Lewis, Jr.*

STATE OF MISSOURI, *District of St. Louis:*

Benjamin W. Lewis, Jr., being duly sworn, on his oath states that the matters and thing in the foregoing answer contained so far as stated of his own knowledge are true, & so far as stated upon information and belief he believes them to be true.

BENJAMIN W. LEWIS, Jr.

Sworn to & subscribed before me this 2nd day of September, 1880.

[SEAL.] A. P. SELBY,
U. S. Commissioner, East. Dist. Mo.

Endorsed: No. 3437. Circuit court of the United States, district of Kan. Benjamin W. Lewis, Jr., *vs.* The Kansas Pacific Railway Company. Answers of B. W. Lewis, Jr., to cross-bill. Glover & Shepley, sols. with Green & Eaton. Filed Sept. 3, 1881. A. S. Thomas, clerk, by W. W. Gelatt, deputy.

116 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

In the Circuit Court of the United States for the District of Kansas.

BENJAMIN W. LEWIS
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, and THE KANSAS PACIFIC RAILWAY COMPANY.

You, the above-named Benjamin W. Lewis, will please take notice that the railway company above named desires the testimony in this cause to be taken orally, and you and your attorneys of record are hereby notified that on Friday, the 25th day of November, A. D. 1881, the above-named Kansas Pacific Railway Company will in the above-entitled suit, at the office of S. T. Smith, at the State Line House in Kansas City, in the county of Jackson, in the State of Missouri, take depositions of S. T. Smith and others, to be used as evidence on the trial of said suit and on the hearing of each and every motion and application therein, and that the taking of said depositions will be between the hours of nine o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned

and continued from day to day, Sundays excepted, at the same place until the taking of the same is completed.

Dated this 21st day of November, A. D. 1881.

CHAS. MUNROE,
Attorney for Kansas Pacific Railway Company.

This notice was served on me this 21st day of November, A. D. 1881, by delivery of a duplicate of the same to me, and dedimus is hereby waived.

J. W. GREEN,
Attorney for B. W. Lewis.

Deposition of S. T. Smith taken by me, J. W. Griffith, a notary public within and for the county of Jackson, State of Missouri, on the 25th day of November, A. D. 1881, in a suit pending in the circuit court of the United States for the district of Kansas,
117 wherein Benj. W. Lewis is plaintiff, and Adolphus Meier, Carlos S. Greeley, and The Kansas Pacific Railway Company are defendants, to be read in evidence on behalf of the Kansas Pacific Railway Company pursuant to the annexed notice.

Present: Carlos Monroe, for the company, and Mr. Shepley, for the complainant Lewis.

S. T. SMITH, being by me first duly examined, cautioned, and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says:

Q. Mr. Smith, please state what your occupation was and how you were engaged during the years 1865 to 1870.

A. I was the auditor of Kansas Pacific Railway Company.

Q. Was this company known by that name as early as 1865?

A. It was the Union Pacific railway, Eastern Division, prior to its change of name to the Kansas Pacific Railway Company.

Q. Was the company known by the name of the Union Pacific Railway Company, Eastern Division, as lately as 1870?

A. I do not just recollect, but think the name was changed to Kansas Pacific Railway Company in 1869.

Q. State, if you please, with some particularity what were your duties as auditor, and whether these duties enabled you to know the financial transactions of the railway company.

A. I had charge of all the accounts of the company, financial and otherwise.

Q. Who was the secretary of the company?

A. At that time Charles B. Lamborn.

Q. Do you recollect when he became secretary?

A. It was on the 17th of August, 1866, as appears by the records of the company.

Q. Do you know who were the directors of the company in
118 1865, after and during July of that year, and of the succeeding years to 1875?

A. I do not now remember all in 1865, but John D. Perry, Adolphus Meier, Carlos S. Greeley, Giles F. Filley, John P. Usher, Alex-

ander C. Anderson, and John P. Devereux were directors in 1865 to August 19th, when Greeley, Usher, Filley, and Anderson retired, and there were elected in their places by the board Thomas A. Scott, William H. Clement, Hugh J. Jewett, and Ashbel Green.

April 2nd, 1866, the stockholders elected John D. Perry, John P. Devereux, Thomas L. Price, Adolphus Meier, Geo. Partridge, Thomas A. Scott, Wm. H. Clement, John McManus, and H. J. Jewett.

April 1st, 1867, there were elected by the stockholders, at Lawrence, Kansas, John D. Perry, Adolphus Meier, Geo. Partridge, Carlos S. Greeley, H. J. Jewett, Thos. A. Scott, Thos. L. Price, John McManus, and Wm. H. Clement.

April 6th, 1868, at stockholders' meeting at Lawrence [there] were elected John D. Perry, Adolphus Meier, William M. McPherson, Carlos S. Greeley, W. H. Clement, H. J. Jewett, John McManus, Thos. A. Scott, and Thos. L. Price.

April 5th, 1869, the following were elected by the stockholders at Lawrence: John D. Perry, Adolphus Meier, Carlos S. Greeley, Wm. M. McPherson, John McManus, Thos. A. Scott, Wm. H. Clement, H. J. Jewett, Thos. L. Price, S. M. Edgell, Wm. J. Palmer. Before this election, by resolution of the board, the number of directors were increased from nine to eleven *directors*.

April 4th, 1870, the following were elected directors by the stockholders: John D. Perry, Adolphus Meier, C. S. Greeley, John McManus, Thos. A. Scott, Wm. J. Palmer, H. J. Jewett, S. M. Edgell, Thos. L. Price, Wm. M. McPherson, and Robert E. Carr.

May 4th, 1871, there were elected by the stockholders Robert E. Carr, Adolphus Meier, Carlos S. Greeley, Wm. M. McPherson, John D. Perry, S. M. Edgell, B. W. Lewis, Jr., Thos. A. Scott, John McManus, Matthew Baird, Wm. Shaw.

May 2nd, 1872, the following directors were elected by the stockholders: Robert E. Carr, Adolphus Meier, Carlos S. Greeley,
119 Wm. M. McPherson, John D. Perry, S. M. Edgell, B. W. Lewis, Jr., Thomas A. Scott, John McManus, Matthew Baird, Wm. Shaw.

May 1st, 1873, the following directors were elected by the stockholders: Robert E. Carr, Adolphus Meier, Carlos S. Greeley, Edwin Harrison, John D. Perry, S. M. Edgell, B. W. Lewis, Jr., F. W. Meister, Thos. A. Scott, John McManus, and Matthew Baird.

May 7th, 1874, the following directors were elected by the stockholders: Robert E. Carr, C. S. Greeley, Adolphus Meier, S. M. Edgell, B. W. Lewis, Jr., John D. Perry, Thos. A. Scott, M. Baird, Robert Barth, Louis H. Meyer, and Theodore G. Meier.

June 25th, 1874, Theodore G. Meier resigned and F. W. Meister was elected in his place. The records of the company do not disclose the fact that Louis H. Meyer or Robert Barth ever appeared at the meetings. On Oct. 10th, 1874, L. H. Meyer resigned and Henry Overstoltz was elected in his place.

May 6th, 1875, there were elected by the stockholders Robert E. E. Carr, Adolphus Meier, Carlos S. Greeley, John D. Perry, S. M. Edgell, B. W. Lewis, Jr., Sidney Dillon, Thos. A. Scott, Jay Gould, Oliver Ames, and J. D. Smith.

Q. Who have been the presidents of the company since your acquaintance with it to date and when did they succeed?

A. John D. Perry was president from 1865 to May 4th, 1871, at which time Robert E. Carr was elected president, and continued so until 1878, when Mr. D. M. Edgerton succeeded him, and continued to act as president until somewhere between 1878 & 1879, when Sidney Dillon was elected president, and who has ever since been the president of the company.

Q. Who was the secretary and treasurer of the company in 1865, after 1st of July?

A. William J. Palmer.

Q. Did Palmer remain treasurer after Lamborn was appointed secretary?

A. Yes, sir; prior to the time Lamborn was elected secre-
120 tary Palmer was both secretary and treasurer.

Q. Who succeeded Mr. Palmer as treasurer?

A. C. S. Greeley and continued up to November, 1876.

Q. Will you please look at the two papers now handed you and state, if you know, what they are and — have any recollection of their being executed; if so, please state and place your initials upon them, that the same may be verified by the notary to be evidence in this case. (Papers Nos. 1 & 2.)

A. One of them was the contract of the railway company with R. M. Shoemaker and Co. for the construction of the line from Lawrence to Fort Riley, and the other between the same parties for the construction of the Leavenworth branch, both dated July 1st, 1865. I know of the execution of these contracts and I identify the same by writing my initial and this date on each of them.

(NOTE.—I, the notary also affixed my name and date to the two papers and marked them No. 1 and No. 2 respectively.)

Q. Please examine the paper now shown you, which purports to be a copy of a contract between the railroad company and Shoemaker, Miller, and others of Oct. 1st, 1866, and state, if you know, whether there was such a contract executed, and if you do if you know where it is. (Paper No. 3.)

A. I have seen the original of the contract, which is similar to this, but I do not know where it is now; it is either lost or mislaid. This copy was made in my office from the original contract.

Q. Was this contract deposited in your office for your information?

A. This with all other contracts were deposited in my office for my information and safe-keeping. The original bore Lamborn's attestation, as shown.

I attach my initials to this paper to identify it the same as the other contracts.

NOTE.—I, the notary, have affixed my name and this date to the papers proved by Mr. Smith and marked it No. 3.

Q. State, if you know, if Mr. Adolphus Meier was vice-presi-

121 dent of the company a portion or all of the time that you have mentioned the names of the directors of the company.

A. Yes, sir; he was.

Q. Please look at the paper now handed you and say if you recognize the same. (Paper No. 4.)

A. Yes, sir.

Q. Do you know the signatures thereto?

A. Yes, sir.

Q. How came that paper in your possession?

A. It was filed in my office at one time for safe-keeping and as part of the records of the company.

Q. Describe it in brief.

A. It is an agreement between R. M. Shoemaker and his associates relating to the construction of the Union Pacific railway, Eastern Division, from Lawrence to Fort Riley, and the Leavenworth branch, dated June, 1865. I have subscribed upon it my initials and this date.

(NOTE.—I, the notary, have affixed my initials and this date to the paper proved by Mr. Smith and marked it No. 4.)

Objection: This contract spoken of is objected to by Lewis, def'd't.

Q. Please look at the paper handed you without date and examine the signatures and see if you know them. (Paper No. 5.)

A. Yes, sir.

Q. Are they the signatures of the parties purporting to sign them?

A. Yes, sir.

Q. Please attach your initials to this, so the notary may identify it.

(Witness attached his initials and date to same.)

NOTE.—I, the notary, have attached my initials and date to the paper proved by Mr. Smith and marked it No. 5.

Q. Please examine the papers now shown you under date of September 15th, 1866. (Paper No. 6.)

A. It is an agreement of Shoemaker, Miller, and others to enter into a contract, under the firm name of Shoemaker, Miller & Co., to build the road between Fort Riley and the point west of the

122 100th meridian to which the Government subsidy in bonds extends.

Q. Please examine the signatures and state whether you know these signatures.

A. Yes, sir.

Q. Are they the genuine signatures of the parties?

A. Yes, sir.

Q. Please endorse your initials upon them.

(Witness endorsed his initials and date upon the paper referred to.)

NOTE.—I, the notary, have also attached my initials and the date to the paper proved by Mr. Smith and marked it No. 6.

Obj.: Objected to as irrelevant and incompetent.

Q. Please state whether the papers you have identified and proved as contracts, except the copy, were all executed by the parties purporting to execute them—that is to say, whether the signatures are genuine.

A. Yes, sir; they are.

Q. Did you have knowledge of certificates being issued by these contractors for the construction of the several parts of the railroad embraced in the three contracts to parties who advanced to them money to enable them to construct the road?

A. Yes, sir.

Q. I will ask you to look at the paper I now hand you and state whether that paper was deposited in your office as auditor and whether it is a copy of the certificates that were issued. (Paper No. 7.)

A. I do not know; they were something like it.

Q. Please add your initials to it, so that it may be identified.

Witness endorsed his initials and the date thereon.

NOTE.—I, the notary, endorsed my initials and the date on the paper proved by Mr. Smith and marked it No. 7.

Obj.: Objected to as incompetent and irrelevant.

Q. Please look at this document, dated Nov. 14th, 1866, and state in whose handwriting it is and whose signatures are attached. (Paper No. 8.)

A. It is drawn up in the handwriting of W. J. Palmer,
123 and is an agreement between parties associated with Shoemaker, Miller and Co. for construction of the railway west of Fort Riley, and is signed by Mr. Perry, Greeley, and their associates in that contract.

Q. State whether that contract was placed among the files of the company by the parties and if the signatures are genuine.

A. Yes, sir; the signatures are genuine.

Q. Please place your initials on it, to the end that the same may be identified and made evidence in the cause.

(Witness endorsed initials and date on the paper referred to.)

NOTE.—I, the notary, also affixed my initials and date and marked the paper No. 8.

Obj.: This contract and the testimony concerning it are objected to by defendants' counsel as incompetent and irrelevant.

Q. Please look at this paper now presented and state what it purports and what you understand it to be. (Paper No. 9.)

A. It is a memorandum of income bonds issued on account of Shoemaker, Miller and Co., giving the number and denomination of bonds and the gross amount issued to each of the parties.

Q. State whether that paper was lodged in your office by same ty and, if you know, by whom.

A. It was turned over to me by Shoemaker, Miller and Co. as part of the original records of the transaction.

Q. Do you know whose handwriting it is in?

A. The first line on top, Income bonds, S. M. & Co., is in Oakes' handwriting; the rest is in handwriting of some clerk; I don't recognize now whose it was.

Q. Who was Mr. Oakes and how was he employed?

A. He was secretary of Shoemaker, Miller and Co.

Q. Please place your initials on this paper, so that it may be identified.

Witness endorsed initials and date on same.

124 NOTE.—I, the notary, also endorsed my inititials and date on same and marked the paper No. 9.

Obj.: The last paper, with all testimony relating thereto, is objected to by defendants' counsel as irrelevant and incompetent.

Q. Please look at this receipt in this book. Do you identify it? ("Bond-book.")

A. Yes, sir; it is the original receipt of Mr. Greeley as chairman of Shoemaker, Miller and Co., dated March 20th, 1869, for the income bonds issued [to] Shoemaker, Miller and Co. on the contract.

Q. Put your initials on the top of it.

Witness here put his initials and the date at top of receipt in bond-book.

NOTE.—I, the notary, also affixed my initials and the date.

Obj.: Objected to by defendants' counsel as irrelevant and incompetent.

Q. Please look at this paper now shown you under date of Sept. 17th, 1866, and state in whose handwriting the first page thereof is. (Paper No. 10.)

A. It is in the handwriting of W. J. Palmer until you come to the name of J. W. Kirk on the third page.

Q. The signatures after and inclusive of Kirk's—do you know these?

A. Yes, sir; except the signatures of Clason and Morse, P. Andrew, and Edward J. Mitchell, all after Kirk are in proper signatures except as stated. Shoemaker's signature is made by Oakes.

Q. Please place upon the paper your initials, in order that same may be identified by the notary.

NOTE.—Witness endorsed initials and date on the paper. Notary public also endorsed initials and date upon the paper and marked it No. 10.

Obj.: The last paper and all the testimony relating thereto is objected to as incompetent and irrelevant.

Q. Please look at the paper now handed you, purporting to be a list of the parties in interest in contract of R. M. Shoemaker and Co., and state in whose handwriting it is. (Paper No. 11.)

125 A. It is in the handwriting of A. H. Calef.

Q. Whose signature is placed at the botton of it?

A. It is certified by Charles B. Lamborn, sec'y, St. Louis, under date of Febr'y 6th, 1867.

Q. Who was Mr. Calef or who is Mr. Calef, and what were his duties and how was he employed at the date of that paper?

A. He was employed in the office of the railway company at St. Louis as clerk at the date of this paper.

Q. Please affix your initials to the paper and this date, in order that the same may he verified by the notary.

NOTE.—Witness affixed his initials and the date to the paper.

The notary also affixed his initials and date to the paper and marked it No. 11.

Q. Do you know whether Wm. J. Palmer was interested in the contracts with R. M. Shoemaker and Co. and Shoemaker, Miller and Co.?

A. Yes, sir; he was.

Q. Do you know what interest he had in the first contract?

A. I do not remember the amount.

Q. Do you know whether Lamborn was interested in either or any of them?

A. I don't remember that he was.

Q. Were you interested in any of them?

A. No, sir; I am sorry to say I was not.

Q. Did the railway Co. keep a book in which they made entry of the disposition of the bonds?

A. Yes, sir; they had a book in which they made the original entry of all the bonds.

Q. Please look at this book and say if it is the book (bond-book).

A. That is the book.

Q. Will you please put your initials on fly-leaf under signature of Wm. J. Palmer, treas'r, in order that the book may be identified?

126 Witness put initials and date on book.

(NOTE—I, the notary, also affixed my initials and date on the bond-book.)

Q. Gen'l Palmer at the time of these entries was treasurer, was he not?

A. Yes, sir.

Q. Did you have immediate charge of the book?

A. No, sir; it was kept jointly by the secretary, treasurer, and myself; this book was in my charge and safe, but the entries in it were our joint action; it is the book, of original entry of disposition of the bonds, and from this book, after being verified by me, the entries were made into the general books of the company.

Obj.: The above-mentioned book and receipt and all testimony relating thereto of the witness objected to as incompetent and irrelevant.

Q. There are some entries in the book indicating that some of the bonds were sent to Philadelphia, to J. C. Reiff; do you remember by whose order or how those bonds came to be sent to him?

A. They were sent there by Gen'l Palmer to be distributed among the parties mentioned; Mr. Reiff to return their receipt and a list giving the numbers of the bonds issued to each party.

Q. Do you know whether any of the contractors named in the contract of R. M. Shoemaker and Co. knew of Palmer's act in sending on the bonds?

A. Yes, sir; they all knew it.

Q. Finally the disposition of these bonds were carried on your books, showing to whom they had been distributed?

A. Yes, sir; their receipts were furnished giving the numbers of the bonds received.

Q. There is also an entry upon the bond-book showing that some of the income bonds had been sent to J. N. Kinney; do you know how they came to be sent and who sent them?

A. They were sent by Lamborn to J. N. Kinney to be issued to the Ohio parties, and were sent to Reiff at Philadelphia to be
127 issued to the Philadelphia parties.

Q. Is that Lamborn's or Palmer's handwriting?

A. Yes, sir; Lamborn's.

Q. Do you know whether any of the immediate contractors know of Lamborn sending them—whether they were sent by order of Shoemaker, Miller and Greeley?

A. It was a matter of daily conversation between the parties and they knew of their being sent.

Obj.: All this objected to as incompetent and irrelevant.

Q. Do you know for what these bonds were given to R. M. Shoemaker and Co.?

A. They were given in payment for building the road.

Obj.: Objected to as incompetent and irrelevant.

Q. The parties in interest—contractors—how were they divided or designated as to localities?

A. Western, Cincinnati, and Philadelphia parties.

Q. What were their relative interests supposed or intended to be?

A. The original proposition was two million dollars—one half Western, the other half divided equally between the Cincinnati and Philadelphia parties.

Q. When the income bonds were distributed to R. M. Shoemaker and Co. the Western parties would be entitled to one-half?

A. Yes, sir.

Q. State whether as many bonds were given to the Western parties as were sent to the Eastern parties.

A. No, sir. There were 1,286,000 in bonds issued to R. M. Shoemaker and Co., of which the Western parties received 633,500 on account of R. M. Shoemaker and Co. and 373,750 issued to the Philadelphia parties, and the remainder, 278,750, to the Ohio parties.

Q. Now, please state what was the total issue of the income bonds.
A. 4,275,350 dollars.
Q. Does the amount you have just stated to have been issued to the Western, Ohio, and Philadelphia parties, with the amount
128 receipted for by Mr. Greeley, cover the whole issue?
A. Yes, sir.
Q. Do you know whether Thomas L. Price, John D. Perry, Robert E. Carr, Adolphus Meier, Thos. A. Scott, Ashbel Green, H. J. Jewett, Geo. Partridge, Wm. H. Clement, John McManus, or either of them, were interested in the contract of R. M. Shoemaker and Co. of July 1st, 1865? If so, state.
A. Yes, sir; all of them were interested.
Q. Do you know whether they were interested in the proportions which the papers you have verified show?
A. Yes, sir; they were interested in the proportions shown by the subscriptions.
Q. Do you know when they became so interested; was it before or after July 1st, 1865?
A. Before July 1st, 1865.
Q. Do you know whether John D. Perry, Thos. L. Price, Adolphus Meier, Geo. Partridge, Thomas A. Scott, Wm. H. Clement, John McManus, and H. J. Jewett, directors elected April 2nd, 1866, were interested in the contract of Shoemaker, Miller and Co., one or all of them?
A. Yes, sir; they were all interested.
Q. Do you know when they agreed to become interested—whether before or after making the contract in Oct., 1866?
A. They agreed to become interested before the date of the contract.
Q. Were the income bonds retained for R. M. Shoemaker and Co., amounting to $633,500, to be distributed among the Western parties in interest in the contract, distributed to such parties?
A. Yes, sir.

It is agreed that defendant Lewis have the same right to object to any of the testimony heretofore taken on the trial that he would have if objection — made at the taking thereof.

Cross-examination:

Q. Mr. Smith, what is your position now in regard to the railroad of the Kansas Pacific Company?
A. I have none.
Q. Have you any over the railroad which was formerly
129 owned by the Kansas Pacific R. R. Company?
A. Yes, I am general superintendent.
Q. Employed by whom?
A. Employed by the Union Pacific R'y Company.
Q. As being part of their road?
A. Yes, sir; as being general superintendent of a part.
Q. Where are the stock-books, books of certificate, transfer of stock, and the stock-ledger of the Kansas Pacific R. R.?

A. I don't know; probably in New York or Omaha.

Q. They are not in your power or control?

A. No, sir.

Q. Do you know where the books are—account-books—stock-books—belonging to the Kansas Pacific R. R'd Company?

A. The books of account were all sent to Omaha.

Q. Where did the other books go?

A. I don't know.

Q. Do you know where the records of the stockholders' and directors' meetings of the Kansas Pacific R. R'd Company are?

A. One of them is now present.

Q. What is that one now present?

A. It is the record of proceedings of board of directors and stockholders from August 19th, 1865, to part way through the record of the stockholders' meeting of May 6th, 1875. It was brought here by Judge Usher, the counsel of the company.

Q. When did you last see the stock-books and stock-ledger of the Kansas Pacific Railway Co.?

A. I have not seen them since 1871.

Q. Were they then sent to New York?

A. No, sir; they were sent there about 1879.

Q. You have not seen them since?

A. No, sir.

Q. Where is Mr. Lamborn, the former secretary?

A. In Colorado.

Q. How long has he been there?

A. He has been there several years.

Q. He has been there since he resigned, has he?

A. Yes, sir.

Q. Were you well acquainted with the persons who were stockholders of the company in 1865, July 1st?

A. Yes, sir.

130 Q. What do you know about the knowledge of the stockholders of the Kansas Pacific railway, or the Union Pacific railway, Eastern Division, as it then was, of their knowledge of the execution of the contract between the Union Pacific Railway Company, Eastern Division, and R. M. Shoemaker and Co.?

A. I know that they were there a great deal and that the thing was under discussion a great many times in my presence.

Q. Did not all the stockholders of the Union Pacific R'y, Eastern Division, know of the making of the contract between that company and R. M. Shoemaker and Company before the time the contract was made?

A. I should think they did.

Q. Was it not a thing well known and publicly talked about among all those interested in the stock of the Union Pacific railway, Eastern Division?

A. Well, it was a subject of daily conversation at the office.

Q. Did you know at the time who were stockholders of the Union Pacific R'y, Eastern Division, as they stood on the 1st of Oct., 1866?

A. I did at that time.

Q. What do you say as to the knowledge of the stockholders of the Union Pacific railway, Eastern Division, as they stood on the first day of October, 1866, knowing of the making of that contract the 1st of October, 1866, between the Union Pacific railway, Eastern Division, and Shoemaker, Miller & Co.?

A. I do not exactly understand your question.

Q. Did those who were stockholders of the Union Pacific R'y, Eastern Division, on Oct. 1st, 1866, know of the making of that contract between the Union Pacific Railway Co., Eastern Division, and Shoemaker, Miller and Co.?

A. I could not say positively as to every one of them knowing it, but it was a matter of general information.

Q. As far as you know was any one who was a stockholder at that time ignorant of the making of that contract?

A. No I don't know [that] there was.

131 Q. How early was your knowledge of the matters connected with the Union Pacific railway, Eastern Division?

A. In February, 1864.

Q. What were you then?

A. I was book-keeper at Wyandotte.

Q. When did you go to St. Louis?

A. I went there in June, 1865.

Q. At the time you were appointed auditor?

A. No; I was appointed auditor some time after that; I was book-keeper, cashier, agent, and everything else before I went to St. Louis.

Q. But from the time you first went to St. Louis you were intimately acquainted with the affairs of the Union Pacific railway, Eastern Division?

A. Yes, sir.

Q. The books show at these dates that I have asked you about who were stockholders of the Union Pacific railway, Eastern Division, do they not?

A. Yes, sir.

Q. What was the condition of the railroad and that company on the first of October, 1866, as to going on as to its extension; was it in difficulty or not?

A. Yes, sir.

Q. Did it have to make extraordinary efforts and offer extraordinary inducements in order to have any one take hold of and extend that road?

A. They were compelled to make a new arrangement and agreement and close out the old contract and make a new one from Fort Riley west.

Q. What was the condition of the company on 20th of June, 1869?

A. The financial condition?

Q. Yes.

A. They were in bad shape and carrying quite a heavy floating debt.

Q. Was anything done by the company in relation to these in-

come bonds and the income mortgage at that time by the Kansas Pacific railway, the successor of the Union Pacific railroad, Eastern Division?

A. Yes, sir; the holders of them were requested to have them subordinated by stamping.

Q. Requested by whom?

A. By the railway Co.

Q. Was that done?

A. It was done to some extent.

Q. What means did the company adopt for the purpose
132 of getting these bonds stamped?

A. They sent out parties to Philadelphia and to Ohio with request of some kind—I don't remember what it was. These parties visited the holders and stamped the bonds of those that would allow them.

Q. What was this thing requested to be done by the holders of the income bonds?

A. It was requested by the company to make them subordinate to the mortgage which they desired to issue for the construction of the extension of the road towards Denver westward from the 394th mile post.

Q. Were the parties who you say applied to the holders of the income mortgage and bonds to have this subordination made authorized so to do by the Kansas Pacific Railway Co.?

A. I presume so, from the fact that they went on that errand.

Q. But you know nothing of your own knowledge as to that?

A. No, sir.

Q. Who were these persons?

A. T. F. Oakes and J. C. Reiff.

Q. Was that mortgage called Denver extension mortgage ever issued?

A. Yes, sir.

Q. At the time you speak of, bearing date June 20th, 1869?

A. Yes, sir.

Q. Do you know anything about whether the Kansas Pacific R'y Co. obtained that extension that they desired from the holders of the income bonds?

A. They did to some extent.

Q. How large an extent; can you tell?

A. I cannot tell.

Q. What book of the Kansas Pacific railway contains any record of the amount of the bonds that were subordinated?

A. I do not think there is any book that will show; there may be, but none of the general books show it; there was no entry ever made in the general books of the company showing the number of each.

Q. You are not able to state to how large an extent these income bonds were subordinated?

A. No, sir.

Q. When was this effort made on the part of the Kansas
133 Pacific R'y thus to induce holders of the income bonds to subordinate them?

A. It must have been in 1866 or 1867.

Q. Was it before the issue of this Denver extension mortgage of the first of June, 1869?

A. It was along about that time.

Q. Suppose it to have been in the spring [of] 1869, Mr. Smith, how long was that after these income bonds had been delivered?

A. Well, it was quite a time; I don't know how long.

Q. How many were stamped in Dec., 1869?

A. 4,043,450, according to an entry in the bond-book by Mr. Lamborn.

Q. Were any additional income bonds stamped after that; if so, when?

A. Between that date, December, 1869, and March 27th, 1871, there were 5,350 additional stamped.

Q. These are entered in this same book you have been testifying about of the Kansas Pacific railway?

A. Yes, sir; making a total of 4,048,800, as shown by the entries made in the bond-book by Lamborn. It escaped my recollection at the time of making former statement that there was an entry of this kind in the bond-book.

Redirect examination:

Q. Please look at the paper now shown you and state if that paper belongs to the files of the company that you kept as auditor. (Paper No. 12.)

A. Yes, sir.

Q. Please verify it by your initials, so that it may be identified.

Witness endorsed his initials and the date on the paper referred to.

NOTE.—I, the notary, also endorsed initials and date on same and marked it No. 12.

Q. This paper which you have just verified refers to a certain amount of the stock of the company as having been transferred to John Edgar Thompson and John D. Perry, amounting to 2,080 shares. Now, do you know of any persons interested in the stock of the company, if there should have been such persons, that knew of these contracts, other than those that were interested in the stocks specified in that paper?

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A. I know there were persons who claimed to have stock other than those mentioned in this paper. I know that some of them knew of these contracts.

Q. The stockholders that you refer to in your cross-examination as being in and out of the office while these contracts were being made, were they not, with the exception of Devereux and Anderson, parties who were interested in that stock mentioned in that paper?

A. Yes, sir.

Q. Do you know of the county of Leavenworth being a stockholder of the company?

A. Yes, sir; Leavenworth county became a stockholder to the amount of $250,000—some time in 1866, before cold weather.

Q. You think it was before October?
A. Yes, sir.
Q. Was not this stock that was reported to be at the office there at the time these first contracts were made, or about that time, stock that had been acquired by sale upon pledges made by Hallett?
A. It was, mostly.
Q. Do you know whether or not there was a controversy between the company as it was then organized in 1865 and several old subscribers to stock about the validity of their stock—whether they should be allowed to participate in the affairs of the company?
A. Yes, sir.
Q. Were not the directors of the company in 1869 whose names you have mentioned before in your direct examination all of them interested in the contracts of July 1st, 1865, and October, 1866?
A. Yes, sir.
Q. And all of them had these income bonds distributed to them?
A. Yes, sir.
Q. I will ask you to state, since you knew, whether there was not a continued succession of directors of parties who were in-
135 terested in these contracts of R. M. Shoemaker and Co. and Shoemaker and Miller?
A. There was up to 1869.

Redirect examination:

S. T. SMITH recalled by the railway company.

Q. Do you know whether the contractors, R. M. Shoemaker and Co. and Shoemaker, Miller and Co., were paid by the railway company the bonds and stock, lands, etc., that were contracted to be paid them?
A. Yes, sir.
Q. Please look at the paper now shown you and state whether that paper was among the files of the company, and if you know the signatures to it.
A. Yes, sir.
Q. The signatures are genuine, are they?
A. Yes, sir.
Q. Please verify it by your initials as before.

Witness verified the paper by affixing his initials and the date.

NOTE—I, the notary, also affixed my initials and date to the paper and marked it No. 13.

Recross examination:

Q. Mr. Smith, you have been asked about the stock claimed by the county of Leavenworth; had not that stock always been repudiated by the Kansas Pacific Railway Co.
A. They refused to allow some parties to vote on it, claiming they were not the rightful owners.
Q. The paper you have testified to, being No. 12, a trust agreement in relation to 2,080 shares of stock, represents the whole stock

of the company as — then existed — 4,160 fully-paid shares of stock; do you recollect who then held the remainder of that 4,160 shares of stock?

A. No, sir; I recollect that Mr. Anderson, Mr. Devereux, and some others held some of it at that time.

Q. Did all those holding the remainder of stock, except
136 the 2,080 shares, have knowledge of these contracts of July 1st, 1865, and October 1st, 1866, for construction of the road?

A. I think so.

S. T. SMITH.

E. C. SMEED, called by the railway company, being by me first duly examined, cautioned, and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says:

Q. State your profession or occupation.

A. I am a civil engineer.

Q. Have you been in the employment of the Union Pacific railway, Eastern Division, afterwards called the Kansas Pacific railway?

A. Yes, sir.

Q. When did you enter the employ of the company?

A. In 1866.

Q. Are you acquainted with the construction of railroads, and do you know the cost?

A. Yes, sir.

Q. Did you become acquainted with the railroad of the company stated, between Leavenworth and Lawrence, called the Leavenworth Branch, and the railroad from Lawrence to 394th mile post west, in 1866?

A. I did; so much of it as was constructed at that time, and was acquainted with the residue as it was constructed.

Q. Considering the cost of material, the price of labor, engineering, etc., at that time, and the manner in which the road was constructed, the Leavenworth Branch and the residue to the 394th mile post from Lawrence, what would be a fair cost in money for the construction of that road per mile?

A. I think $10,000 per mile.

Q. I am under the impression that the material at that time would cost nearly that?

A. I don't remember the price.

Q. Assuming the price of iron to be $100.00 per ton.

A. About $15,000 per mile.

Obj.: Objected to as incompetent and irrelevant.

E. C. SMEED.

137 I, J. W. Griffith, a notary public within and for the county of Jackson and State of Missouri, do hereby certify that S. T. Smith and E. C. Smeed were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed, as above set forth, were reduced to writing by A. W. Scribner in my presence and in the

presence of the witnesses, and were respectively subscribed by the said witnesses in my presence, and were taken at the time and in the place in the annexed notice specified; that I am neither counsel, attorney, -or relative of either party, or otherwise interested in the event of this suit.

In witness whereof I have hereunto set my hand and notarial seal this 25th day of November, 1881.

My commission expires April 22, 1882.

[SEAL.] JOHN W. GRIFFITH,
Notary Public.

Notary fees 25.00, paid by the Kansas Pacific Railway Co.
Opened at the request of def'ts' att'y, June 5, 1882.
Filed Dec. 5, 1881.

A. S. THOMAS, *Clerk*,
By GEO. N. HOLMES, *Deputy.*

Endorsed: No. 3437. Deposition of S. T. Smith. Filed Sept. 6, 1882. A. S. Thomas, clerk.

138 In the Circuit Court of the U. S. for the Eastern Dist. of Kansas.

B. W. LEWIS, JR., *vs.* THE KANSAS PACIFIC RAILWAY CO.

Depositions of C. S. Greeley, page 1; *J. D. Perry, page* 29.

In the Circuit Court of the United States for the Eastern District of Kansas.

BENJAMIN W. LEWIS, JR., *vs.* THE KANSAS PACIFIC RAILROAD CO.

Be it remembered that on the 20th day of May, A. D. 1882, I, L. L. Walbridge, a notary public within and for the city and county of St. Louis, in the State of Missouri, and duly commissioned and qualified under the laws of the United States to take depositions for use in the circuit courts of the United States, did call and cause to be and personally appear before me at the law office of Glover & Shepley, No. 100 North Fourth St., in the said eastern district of Missouri, city of St. Louis, State of Missouri, Carlos S. Greeley & John D. Perry to testify and the truth to say on the part and behalf of the plaintiff in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the eastern district of Kansas, wherein Benjamin W. Lewis, Jr., is plaintiff and the Kansas Pacific Railroad Co. is defendant.

Present on behalf of the plaintiff: John R. Shepley, Esq.

Present on behalf of the defendant: Hon. J. P. Usher and —— Monroe, Esq.

And the said CARLOS S. GREELEY, of lawful age and having been by me first cautioned and duly sworn to tell the truth, the whole truth, and nothing but the truth in the matter of controversy
139 aforesaid, was examined, and he did thereupon depose, testify, and say as follows, viz:

Direct examination by JOHN R. SHEPLEY, Esq.:

1 Q. State your name, age, and residence.

A. My name is Carlos S. Greeley; I am 70 years old; I reside in St. Louis.

2 Q. Were you ever connected with the Kansas Pacific Railroad Co.?

A. Yes, sir; I commenced first in 1864–65.

3 Q. Were you connected with that road in any official capacity? And, if so, state what?

A. I was treasurer of the road several years after my first connection with it.

4 Q. Were you a director of the road at any time; and, if so, when?

A. I think I was elected before 1868.

5 Q. Have you continued to be such director from that time on? And, if so, state.

A. I was treasurer and director for 5 or 6 years.

6 Q. Are you a director now?

A. No, sir.

7 Q. When did you cease to be a director?

A. A year ago.

8 Q. Then from the time you were first elected director to about a year ago you had been a director all the time of the Kansas Pacific railroad?

A. I was director up to the time the receiver was appointed and then resigned; I was director for a little while in 1865 and then resigned and was elected again shortly after, pending the execution of certain contracts.

9 Q. You were a director in 1865?

A. Yes, sir.

10 Q. Did you not resign in August, 1865, and were you not re-elected in April, 1867?

A. I think that is about the time I resigned, and some other persons were put in the board, and afterwards I was re-elected; I think that is as near as my recollection serves me.

11 Q. You continued to be such director until about a year ago all the time on?

A. No; when I was appointed receiver I resigned as director and treasurer.

140 12 Q. That was in 1876?

A. Yes; when appointed receiver I resigned as treasurer and took the receivership, and when the consolidation took place I was elected director in the consolidated board.

13 Q. What time were you elected in the consolidated board?

A. I was elected the first meeting of the consolidated board; I was elected a director.

14 Q. Were you elected as a director of the Union Pacific Railway Company or the Kansas Pacific Railroad Company?

A. I was elected director of the Union Pacific Railway Company after the consolidation in that board.

15 Q. There was no separate organization then of the Kansas Pacific Railroad Company kept up after the consolidation in 1880?

A. There was not that I am aware of.

16 Q. Were you a party to the construction contract, made and dated the first day of October, 1866, by certain persons with the Union Pacific Railway Co., Eastern Division, afterwards called the Kansas Pacific Railroad Co.?

A. Yes, sir.

17 Q. Would you be able to recognize that contract if you were to see it?

(Paper shown to the witness.)

A. Yes, sir; I should say that was a copy of the contract.

(It is agreed that the paper shown to the witness is the paper called for in the pleadings as being the contract dated the 1st of October, 1866, made *with* Shoemaker, Miller & Co. with the Union Pacific Railroad Co., Eastern Division.)

18 Q. Were you also interested in the contract made *with* R. M. Shoemaker & Co. with the Union Pacific Railway Co., Eastern Division, for the construction of a part of the road to Fort Riley, and also Leavenworth branch?

A. Yes, sir; to the 140th mile post.

19 Q. And also for the construction of the Leavenworth branch?

A. Yes, sir.

(It is agreed that they were the same set out in the pleadings in this case.)

141 20 Q. Will you state what the condition of the country was at the time these construction contracts were entered into, beginning with the time at which the first contract was entered into between R. M. Shoemaker & Co. with the Union Pacific Railroad Co., Eastern Division, dated the 1st day of July, 1865?

A. As to its population?

21 Q. Yes; and as to the country through which it was to pass.

A. It was a prairie country, very sparsely settled; the chief settlements were Lawrence and Topeka; it was a new country.

22 Q. What kind of a country was it from Ellsworth on west?

A. A pretty hard-looking country—very few inhabitants.

23 Q. Was there any cultivation?

A. Not much.

24 Q. Was it known whether it could be cultivated?

A. There were serious doubts on the part of a good many whether it could ever be occupied and populated.

25 Q. What obstacles did you find in getting persons that were willing to work to construct the road, if any?

[A.] Well, we had some difficulty here in making up our party; there were very few of us in it—McPherson, and Edgell, and Perry, and Meier, and a few that were willing to take the chances; there were quite a number I spoke to—men of means and influence—who refused to have anything to do with it. For instance, I spoke to Mr. Crow, who had money to invest, but he declined; he wouldn't put a dollar in. I recollect that I spoke to Mr. Baker, who is now

dead; he had money to invest, but he wouldn't put all his money, he said, in any such place. These two I recollect of speaking to at the time we were making up our pool here for our amount.

26 Q. What efforts were made, if any, to obtain contracts for the construction of the road?

A. Well, there was some half dozen or more here who agreed to go in pretty heavy in order to raise the necessary means, and it may be proper for me to state how we got into this thing or how
142 several of us got into it. I didn't go in voluntarily. Mr. Perry was in it very heavy, and he called us together one day and stated the condition of things; that he had gone as far as he could go financially, and stated that he would like to get assistance. A meeting was held in the Exchange Bank, and about a dozen of us were present, and the whole matter was talked over, and his proposition to us was for us to furnish him the money, for which he would pay us 10 per cent. interest and give us a relative interest in the contracts that he had with one Sam. Hallett. We talked there for two hours, and finally I got a little tired of sitting there, and I believe that I was the first one that spoke, and I said, I will advance 10,000 on these terms, and upon that they all said they would go in so much—Giles F. Filley, I think, $15,000, and others followed suit, until about the whole amount was made up which he asked for, which was $150,000. The money was called in as he needed it to pay for the work, but Sam. Hallett was killed and the whole thing then dropped, and we were in, and we then went in under this contract. That is the way I got in it in the first place.

27 Q. What year was that?

A. I am not sure whether in 1864 or 1865, but I think we went in before Hallett was killed, and I think it was about June or July, 1864.

28 Q. Did you find any one who was willing to go in and make a contract with the company for the construction of that work upon the Leavenworth branch and on the main line, except those who were interested in the company?

A. There were a very few that I know of except those that were in. This party that I spoke to, that went in, was substantially the party that met at the preliminary meeting at the bank to which I have alluded.

29 Q. I am talking now afterwards?

A. There were some who went in on my representations and some on Mr. Perry's representations. For instance, Mr. James Smith,
143 who was a very cautious man, and who went in on my representations.

30 Q. State whether the parties or men who went into these contracts were interested in the company itself as stockholders.

A. Yes, sir; they were.

31 Q. Will you look at the condition of the contract of the 1st of October, 1866, and state what the consideration for the construction which the contractors agreed to make the road was under that contract?

A. We got $16,000 per mile, Government bonds; we issued $16-

000 per mile of first-mortgage bonds, and then we had a certain amount of stock and a certain amount of bonds for each mile of road, which we received and distributed in proportion to each man's interest.

32 Q. As a part of the consideration to be received for the construction of the road, will you state whether that contract agreed to furnish any income bonds?

A. Yes, sir; that was a part of the contract.

33 Q. What did that contract agree to give the parties constructing the road as far as the income bonds of the company were concerned?

A. $10,000 per mile of income bonds for each and every mile of railroad and telegraph line built under this contract; that was the agreement.

34 Q. Did they contract to pay any debts due on the part of the former contractors on the road; and, if so, how much?

A. Yes, $400,000 of income bonds and $600,000 of stock.

35 Q. Was the debt thus due by the Union Pacific Railway Co., Eastern Division, to the former contractors paid by the contractors, Shoemaker, Miller & Co.?

A. Yes, sir.

36 Q. How much did that amount to which they paid according to your best recollection now?

A. I can't state distinctly now.

37 Q. It was over $400,000, was it,?

A. It was over $400,000 if I recollect right.

38 Q. When were the income bonds issued to the best of your recollection?

144 A. They were issued, I think, in installments as payments were made and as money was paid in.

38¼ Q. Do you recollect when—what time—this debt due by the company to the former contractors was paid by Shoemaker, Miller & Co.?

A. It was paid at the completion of the contract, or before the completion of the contract—at the end of it.

38½ Q. Did you receive a portion of these income bonds?

A. I did.

39 Q. Did the portion that you received embrace a part of the money which you had furnished for paying the debt due on the former contract?

A. It did.

40 Q. At the time of making the contract of the 1st of July, 1865, and at the time of the making of the contract of October 1st, 1866, did you know anything as to the knowledge of this contract by the holders of the stock of the Union Pacific Railway Co., Eastern Division, at that time?

A. It was understood what the contract was by the parties who had the interests, either stock or bonds or anything else. There was no secrecy about it that I know of; at least I represented to the parties what we were to get in speaking to them to induce [them] to take an interest.

41 Q. Do you know of any persons that were interested as stockholders in that company who were not cognizant of these construction contracts as made?

A. I know of none.

42 Q. Do you recollect the contract made with the county commissioners of the county of Leavenworth in regard to the taking of some $300,000 of stock of the company?

A. We gave them a quarter million of stock, for which they were to give us a like amount of the bonds of the county, and we were to complete the branch road. The contract was made to build the branch road, and after that, if I recollect right, we made this arrangement with the county for 250 of the county bonds, and they were to take $250,000 of the stock of the road.

145 43 Q. At the time of that contract for the taking of the stock of the company by the county of Leavenworth was anything said about these construction contracts between the county commissioners and those acting for the company?

A. I think the county commissioners were cognizant of the nature of the contract; I talked it over with some of them that were then county commissioners at that time.

44 Q. Do you recollect anything about a contract that was made by some of those interested in the construction contract with the county of Leavenworth in regard to the construction of the Leavenworth branch?

A. We agreed to construct the Leavenworth branch and to have it finished to Leavenworth at a stipulated time—entire to Leavenworth.

45 Q. Was there in the consultation which resulted in the subscription of $250,000 of that stock any concealment; were not these construction contracts canvassed between the parties at the time?

A. I have heard them talked over by the parties and some of the commissioners of the county court, those who were then commissioners of the county court. I think that Sam. Stinson, an attorney that lived in Leavenworth, that the matter was talked over with him, I recollect, in his presence and in the presence of some of the different commissioners of Leavenworth county in regard to the contracts that we had for building the road and the branch road.

46 [Q.] Do you know anything about whether the contracts for the construction of the road, whether they were cognizant of these construction contracts, and whether they asked to see them, and whether they were exhibited to them?

A. I can't say that they were exhibited to them, but I can only say, as I said before, that it has been talked over, and my recollection of the matter is that it was talked over in the presence of some of the commissioners of the county who were commissioners at that time.

47 Q. These construction contracts related only to the
146 building of the road up to the 395th mile post, didn't they?

A. That was the Shoemaker, Miller & Co. contract.

48 Q. After having completed or nearly completed it to the extent

of the 395th mile post, was there any difficulty then as to the further extension of the road?

A. Yes, sir; there was some.

49 Q. Where would these construction contracts have left the road if it had been completed?

A. Left it out in the prairie.

50 Q. Where did these construction contracts leave the road after they had been completed?

A. Left it out in the prairie.

51 Q. Finished or unfinished, as far as the terminus was concerned?

A. The terminus, according to the contract, was finished at the 395th mile post.

52 Q. What difficulties arose as to the finishing of the road to some point where it could be made profitable?

A. The difficulty was, if I recollect right, of the probability of being able to negotiate the securities with which to get the money to finish the road through to Denver, which is called the Denver extension.

53 Q. Had the railroad any means by which it could undertake to finish the road to Denver?

A. It had none.

54 Q. What means were then resorted to by the company for the purpose of finishing the road?

A. The first move, if I recollect right, was the subordination of the income bonds.

55 Q. How was that accomplished?

A. It was accomplished by each man's signing a paper agreeing to subordinate his bonds.

56 Q. Why was that necessary?

A. Couldn't well negotiate the Denver extension bonds without, as we were well satisfied.

57 Q. Why was the necessity of executing a new mortgage upon the road?

A. To raise the money with which to complete the road to Denver.

58 Q. Could it be done at all unless the mortgage which
147 was afterwards executed, called the Denver extension mortgage, was put upon the road?

A. I don't believe it could have been done.

59 Q. Was it possible to do it without that?

A. I don't believe it was; it didn't look to us at the time as though it was.

60 Q. To what extent were the efforts of the company successful in obtaining the subordination of the bonds held by the owners—of those income bonds?

A. According to my recollection, nearly all who were applied to subordinated their bonds; I have one case in my mind which is familiar to all, I guess, that had anything much to do with the K. P.; I think Mr. Oakes went to Ohio, and Mr. Reiff took the matter in hand in Philadelphia; Oakes went to different parties in interest,

the holders of those bonds, and among the rest was Hill Jewett, who had $10,000; when Oakes first applied to him he said yes; he would subordinate his; Oakes went on and got others to subordinate and then went to Jewett and he declined to do it, which we didn't like much, any of us.

61 Q. Do you recollect after the efforts of the company had been suspended in endeavoring to get those bonds subordinated to what extent there remained outstanding unsubordinated bonds?

A. I think less than $300,000; I don't know the exact number; less than that, I think, were unsubordinated, if I recollect right; I don't think we could have built the road unless we had accomplished that, and then, that having been accomplished and the bonds put on the market, some of them were sold then as low as 82 and 82½—first-mortgage bonds.

63 Q. The Denver extension?

A. Yes; Carr went east and sold the last of them, I think, at 82½ cents.

64 Q. How many out of the income bonds had gone into the open market at the time this effort was made?

A. There wasn't much sale or any market for them scarcely.

65 Q. Did you become one of the persons who agreed to sub-
148 ordinate your bonds?

A. Yes, sir; I signed the paper.

66 Q. Do you know where that paper is?

A. I do not; I suppose it is among the papers; I suppose Mr. Smith has it.

67 Q. Did the company send its agents to the holders of the income bonds for the purpose of having this subordination made?

A. Yes, sir; Mr. Oakes went to Ohio, as I stated before, and Mr. Reiff took up the Eastern parties.

68 Q. This contract on the part of *the part of* the company to furnish certain considerations to them for the construction of the road under the agreement of the 1st of October, 1876, was it an entirety or not?

A. They agreed to build and equip the road, stipulating what equipment, and everything to make it a first-class road, such as should be accepted by the Government commission.

69 Q. And in consideration of it they were to receive certain——

A. In consideration of that they were to receive certain Government bonds, first-mortgage bonds, certain income bonds, and a certain amount of stock; that is the whole story.

70 Q. Did the contractors perform their part of the contract?

A. Yes, sir; I had $100,000 in the first contract.

71 Q. The second contract, was that performed?

A. Yes, sir; I had $75,000 in the second.

72 Q. Was the road built?

A. The road was built and completed, and accepted by the Government commissioner, and the Government bonds were issued and sold except 160, which Ross, Steele & Co. got to settle their suit.

73 Q. Were not almost all those who were owners of the stock in-

terested in these construction contracts; that is, had they not to complete the road themselves finally?

A. Certainly they did; it was the pool made up; you may say pools are tangible; a pool made up by parties to go and
149 build the road, and after building and completing the road they were to receive certain securities for doing it.

74 Q. Do you know of any person who was a stockholder in that company that was not cognizant at the time that they were made of the making of these contracts that you have spoken of?

A. I don't know of any one that didn't know the general nature of the contracts. I don't know that every one read the contracts, but they knew from representations to them what they were to get when they put the money in—what they were to get for it—otherwise they wouldn't have put their money in.

75 Q. Was there any concealment at the time of these contracts?

A. I never knew of any concealment, and I am sure I had none.

76 Q. How soon, to the knowledge of the company, were the income bonds bought and sold in open market?

A. I don't recollect, but I know there was very little market for income bonds. I held $140,000 of income bonds way up to the time when it looked as if the whole thing would be sold out under the foreclosure before I undertook to sell any, and when I did they sold very low.

77 Q. Do you recollect whether they were bought and sold in open market previous to the 29th of June, 1878?

A. Yes, sir; I think there were some sold prior to that, but I can't tell what the market was.

78 Q. I am not asking what they were sold for, but whether they were dealt in and sold in open market?

A. I think there were some limited sales, perhaps, prior to that.

79 Q. What time did Mr. Jordon become president of the road?

A. I don't recollect.

80 Q. Before he was elected, who was president of the road?

A. Mr. Perry was president of the road and Mr. Carr afterwards. Just before Mr. Jordon was elected Mr. Robert E. Carr was president.

81 Q. Did Jordon continue to be president up to the time
150 of this consolidation you spoke of?

A. I don't recollect whether he or Mr. Dillon was president of the Kansas Pacific railroad up to the time of the consolidation.

82 Q. When did you hear, for the first time, any intimation that there was any invalidity in the income bond mortgage from any one connected with the road?

A. I don't recollect of hearing anything of it until after the consolidation.

83 Q. Were you at any time one of the trustees of this income mortgage?

A. Yes, sir; I was one of the trustees and Mr. Adolphus Meier was the other.

84 Q. Did you at any time resign that trust?

A. I did.

85 Q. Do you recollect who was elected trustee in your place?

A. I do not.

86 Q. Do you recollect of making an answer in this suit in reference to the first suit?

A. It seems to me I did.

87 Q. That answer truly states the facts in the case, does it?

A. Yes, sir.

88 Q. You stated that you remained a director until about a year since—a director of the Kansas Pacific Railroad Co. and of the consolidating railroad, composed of the Kansas Pacific and the Union Pacific, until about a year ago.

A. Until a year ago last January, I think, I was left out; they asked me if I had any objections to being left, and I of course had none, and they wanted to put in some one east, I think; I don't know who.

89 Q. Do you recollect who composed the board of directors of the Kansas Pacific railroad at the time you finally terminated your connection with the road?

A. When we made our sale and went out (Mr. Perry and Mr. Carr were then directors) we resigned and — places were filled; I resigned among the rest, and then, when the consolidation was made, I resigned when I accepted the receivership.

90 Q. Were you not re-elected?

151 A. In the consolidation I was re-elected.

A. In the consolidation I was re-elected.

91 Q. Were you not elected a director of the Kansas Pacific railroad after you resigned the receivership?

A. I don't know but I was; I think, perhaps, I was for the purpose of carrying out the organization, &c.

92 Q. Do you recollect who composed the directory at the time you were last a director in the Union Pacific Railway Co.—who were your codirectors—I mean just before the consolidation?

A. No, I can't recollect; the only two who lived in St. Louis were myself and Mr. Jordon, I think.

93 Q. Was Mr. Gould a member of the board?

A. Yes, sir.

94 Q. Was Mr. Dillon a member of the board?

A. Yes, sir; that is my recollection.

95 Q. Did they become, before that time, large owners of the income bonds?

A. Yes, sir.

96 Q. How long before the consolidation had there been a sale of these bonds on the open market—a large sale; how long before the consolidation had income bonds been bought and sold on the market?

A. They were sold in 1878. Some were bought and sold to a limited extent prior to 1878; small quantities; not a general market for them.

97 Q. Well, about 1878 and after?

A. In 1878 they began to sell on the market and to change hands rapidly; were bought in large quantities, and in some cases, I think, there was quite a quantity, I think, bought by some brokers in New

York, if I recollect right; I don't know how many they had nor exactly who the parties were that held them; I have never heard them spoken of in general terms.

98 Q. Who was secretary of the company at the time of these transactions—the making of these construction contracts?

A. Charles B. Lamborn.

99 Q. Where is Mr. Lamborn?

A. I don't know; I heard he had gone up on the North Pacific railroad as land commissioner—either had gone or was
152 going—but I think he has gone; he has been living at Pueblo.

100 Q. He hasn't been in the State of Kansas for a long time, as far as you know?

A. Oh, no; not for several years. He has been appointed land commissioner for the Northern Pacific railroad.

101 Q. Do you know John B. Devereux?

A. Yes, sir.

102 Q. What position did he hold in reference to the Kansas Pacific Railroad Company?

A. I think from the first incipiency he acted as secretary.

103 Q. What has become of him?

A. He is out.

104 Q. Judge Usher has been general solicitor of the company all the time, has he not?

A. Yes, sir, and is so now.

Cross-examination by Hon. J. P. USHER, counsel for defendant:

105 Q. These income bonds were, by the holders that were connected with the company, put in a pool to be settled and compromised by Gould?

A. When we sold out?

106 Q. Yes.

A. Well those of us who were in the pool put our bonds in.

107 Q. You were in the pool?

A. Yes, sir.

108 Q. They were compromised by the company, were they not?

A. We sold our bonds at the stipulated price.

109 Q. At what price?

A. The income bonds?

110 Q. Yes.

A. Put in the pool at 30 cents.

111 Q. And took other bonds of the company for them?

A. Oh, no; I am speaking [of] when we sold out the pool to Gould. We put them in the pool first. We held an interest in the pool; subsequently sold out our interest in the pool.

112 Q. You put them in the pool at 30 cents?

A. Yes, sir.

113 Q. And afterwards sold out the pool?

A. Yes, sir, and got the money.

153 114 Q. Did you remain in the pool?

A. No, sir; I didn't; I sold all out.

115 Q. What did the pool get of the company for the income bonds?

A. The company had nothing to do with it; it was our individual property.

116 Q. But the company afterwards took them up with other bonds, didn't they—with these income bonds?

A. I don't know what arrangement was made between Gould and the company; Gould got us out and paid us the money; I don't know the arrangement between him and the company.

117 Q. Didn't you remain in the pool to the extent of 50,000?

A. No, sir; I sold all out and then I took 50,000 in that pool business.

118 Q. Didn't the pool get 50 per cent. for the bonds in the other bonds of the company?

A. I don't know what amount of the income bonds; we had stock and bonds and Denver extension bonds; we had half a million dollars of Denver extension bonds in the pool.

119 Q. But you gave it all up for a less amount of consolidated bonds, didn't you—consols—30 millions?

A. Well, I took some consolidated bonds and some stock in the consolidated company.

120 Q. You don't know at what rate you took the consolidated bonds?

A. I don't know at what rate they calculated the income bonds at.

121 Q. The other went in the pool at 30?

A. They went in the pool at 30; what we put in the pool at.

122 Q. Did your bonds sell for more than about 16 to 17 cents?

A. They commenced at about 10½ and went up to 18 or 19—that is, Mr. Gould commenced to buy them and they went up to that, and then I think he stopped buying; that is according to my recollection.

123 Q. He bought at 10?

A. I think he commenced at 10 and 10½.

124 Q. Then they went up to 18?

A. Then they went up to 18 and 19, and I think he stepped
154 out as near as I can ascertain when they got up to that; that is only hearsay; I don't know that.

125 Q. These contracts that you have spoken of, made in 1865, do you recollect whether you were present with the county commissioners of Leavenworth at any time before they subscribed for the stock?

A. I don't recollect that I was with them as a body of commissioners, but I think with some of them who were commissioners of the county.

126 Q. Do you remember who?

A. I think I met Mr. Palmer; I think he was chief justice.

127 Q. And president of the board?

A. Yes—of the board of commissioners.

128 Q. Where did you meet them?

A. In Leavenworth.

129 Q. Do you recollect whether the county commissioners made the contract for the subscription of the stock?

A. There was an agreement entered into, according to my recollection.

130 Q. In writing?

A. I couldn't swear that it was in writing; I can't swear that it was a written agreement.

131 Q. Does your memory serve you to state whether there was an agreement that the road was to be built to Leavenworth by the first of the next ensuing May or by May next ensuing?

A. There was, as I stated in my direct testimony; I think that they were to build it into Leavenworth at a stipulated time, but, according to my recollection, heavy rains prevented Shoemaker from doing it, and he got an extension of time from the commissioners, so that he got in a few days after the stipulated time; that is my recollection of the matter.

132 Q. I will ask you if you don't recollect that the contract stated that the company was to build the road in by May—some time in May—and there was a controversy, without naming any day; but this controversy arose afterwards, whether it meant the first day of May or any time during the month of May, and to remove all trouble before May Shoemaker went and got them by a resolution to agree to extend the matter.

155

A. That is my recollection of the matter.

133 Q. Then the stock was afterwards delivered by the company and the bonds were received by the company?

A. Yes, sir.

134 Q. And the company delivered the bonds to the contractors, didn't they?

A. Yes, sir.

135 Q. Do you know if Mr. Palmer ever knew the terms of the contracts?

A. No further than that the matter was talked over as to our having the contract—the contracts of building the road, and so on.

136 Q. Do you know whether it was not true in point of fact that Shoemaker went to work for some time before the contracts were actually made, and they were dated back?

A. I think the work was commenced on the road before the contract was actually consummated.

137 Q. Actually reduced to writing?

A. I think that is my recollection of the matter.

138 Q. That he had done considerable work before the contract?

A. I don't know to what extent or how much work he had done.

139 Q. But that the contracts were actually dated back, you recollect that, don't you?

A. I don't recollect that part of it; I can't say as to that.

140 Q. Well, now, the pool that you have spoken of, having been made up to build these roads or to carry out these contracts, will you state whether half of the funds were furnished by Western parties or Missouri parties here, and the other by Eastern parties?

A. In the contract — R. M. Shoemaker & Co. our parties had $1,118,000 and some hundred dollars, when Tom Scott and his party came out here and the negotiation was commenced in regard to their joining us, and we agreed to make the amount of the pool two million dollars, they having one million and our parties one million; they paid to us $118,000 and some hundred dollars, so that they stood one million in and we stood one million in.

141 Q. They paid then more than a million, didn't they?

156 A. No; they paid a million and they had to pay us back 118,000 to make us equal with them a million each.

142 Q. They would have to pay just half, wouldn't they, to make them equal?

A. What I mean by that is made us an equal interest, a million each and a half of it; that was the result of it, half of $118,000 and some hundred dollars.

143 Q. This million of dollars raised by Scott and his friends was raised partly in Ohio and partly in the East?

A. Yes, sir.

144 Q. The million of dollars which the Missouri parties put in was all in the road?

A. Yes, sir; and $118,000 besides.

145 Q. So that you didn't advance any more money on the first contracts here?

A. No.

146 Q. Now was there any stock out, ever recognized to be out, except that which was recognized when these contracts were made?

A. Didn't recognize any stock out except what was given for the contracts.

147 Q. On the contracts?

A. Yes, sir.

148 Q. Whatever old stock was out you claimed that was already canceled?

A. We ignored that.

149 Q. So that the stock that was out and recognized by the company from the time of this meeting here in 1865 down to the consolidation all proceeded from the contracts?

A. Yes; stock given to the contractors.

150 Q. Except the Leavenworth county stock?

A. There was a certain stock Mr. Glover had that he got from Boyle.

151 Q. When you entered into this contract with Scott and his party there was certain stock that was recognized as already out—a certain piece with Mr. Boyle—do you recollect anything about that?

A. I recollect something about that.

152 Q. And it was all fixed up, was it?

A. Yes; as far as I know.

153 Q. And you allowed Bennett to have certain stock

157 which I afterwards controlled?

A. Yes, sir.

154 Q. Now this stock that was recognized as proper stock at that date, what was done with that for the time being?

A. It was held, I think, in a block for distribution—transferred to Perry and somebody.

155 Q. John E. Thompson; do you remember well enough to state that?

A. I think it was transferred in a block to Perry and some one—I think it was Thompson—as trustee to be held for the subscribers in pool.

156 Q. Then, after these contracts were supposed to have been executed, this stock was retransferred?

A. *Pro rata* to the amount of interest each man had in the pool.

157 Q. Was Thompson interested in these contracts and a subscriber in them?

A. Yes, sir.

158 Q. And Thomas Scott?

A. Yes, sir.

159 Q. And William H. Clements?

A. Yes, sir.

160 Q. They were Eastern parties?

A. Clements is an Ohio party.

161 Q. Well, we call them Eastern here—Ohio and Pennsylvania—was divided between them a million of dollars. When these two contracts were first completed the company had a settlement with the contractors, didn't they?

A. Yes, sir.

162 Q. And there was found to be indebted to them, according to that settlement, $400,000?

A. $450,000.

163 Q. Were all the directors at that time, unless it was Devereux, already interested in these contracts?

A. I don't think Judge Devereux ever had any interest in the contract.

164 Q. All except, I will put it.

A. Yes; the Judge declined to take any interest in it anyhow—to put any money in.

165 Q. But he was a director for awhile?

A. Yes; for awhile.

166 Q. All the rest were interested in the contracts, were they not?

A. Yes, sir.

167 Q. And had received stock in the contract?

A. Yes, sir.

158 168 Q. And these income bonds also?

A. Yes, sir.

169 Q. In the new contract that was made for building the road on from Fort Riley as far as the Government subsidy and bonds extended, that was the form of the contract?

A. It was — the 394th mile post that the Government bonds extended, I think; — actually built some further.

170 Q. In paying this money back, or in the settlement that you

made with the company—with the directors of the company—in which you estimated the company owed the contractors some $400,000 and odd *thousand dollars*, the company, or Shoemaker, Miller & Co., actually paid back to themselves largely this $400,000, didn't they?

A. I don't recollect clearly about that.

(Paper shown witness.)

171 Q. This is a copy of the subscription list of the first contract of R. M. Shoemaker & Co., and this is a list of the subscribers to the contract of R. M. Shoemaker & Co. Now, can you look over that and state how many of them were interested in the new contract?

A. I don't know as I can. (Witness examines list of Shoemaker, Miller & Co.) I should say that list was correct.

(Paper referred to is marked Exhibit A by the notary.)

172 Q. Please look at the paper now shown you and state whether, as far as you know, and especially as to yours, whether your proportion in the Delaware lands in the contract for building the Leavenworth branch road was estimated to be of the value stated in that paper?

A. I should say that was substantially correct. I base it more particularly on my own amount.

(Paper referred to is marked Exhibit B by the notary.)

173 Q. Had there been much change of hands of the stock up to the time the income bonds had been subordinated?

A. I think there had, according to my recollection.

159 174 Q. Was the company controlled by the same parties and its executive officers much the same?

A. Much the same.

175 Q. Shoemaker had disposed of his, hadn't he, before that time?

A. I think he had; I can't say for certain.

176 Q. Who did Shoemaker sell his stock to?

A. I don't know.

177 Q. For each dollar the subscribers put into these contracts—that is, the first contracts—about how much did they get out in securities—in stock?

A. Well, I can't answer that question definitely, for the reason that I didn't keep any books at all; didn't make a single entry on the book. I took all the bonds and all the stock that the contract awarded me and tucked it away in my trunk, and I haven't a book in the world to show how many bonds or shares of stock I received or how many income bonds I received. Mr. Gale kept the exact account, and if he was alive he could show exactly what he got, but I didn't; I just grabbed them and put them in my trunk and let them lay there.

178 Q. Did you get as much as 3 for 1?

A. Oh, no; I got well paid for my investment; I sold my income bonds at 12½ cents and the stock pretty cheap.

179 Q. Can you state how much the road actually cost per mile in money?

A. Oh, we considered we were pretty well paid for taking such a risk. We were gambling fellows then, it is a fact, and I tell you it took bold men to go into a thing of that kind in those days; our conservative men wouldn't have anything to do with it.

180 Q. I didn't know but what you were willing to state.

A. I can't tell; all I can state is from hearsay—that is to say, I can tell you what the conservative men like James Smith informed me. He never would put a dollar into that enterprise if it had not been upon my judgment, and he would say, "Greeley, if you will go in $100,000 I will go in $10,000," while at that time he
160 was worth a good deal more money than I was and he went on my judgment, and he would say when he got in and got that he sold out before the thing went down out of sight, as he imagined it might, and I recollect once hearing him say that he got about 2 to 1; that is all I know about it; I cant tell anything about what I got; didn't make any difference; I grabbed all I could get and tried to make good use of it, and I wouldn't go into another such a thing to-day if it was offered to me; positively I wouldn't go into it to be bothered with it if I had to go through what I had to go through with that.

181 Q. He sold as soon as——

A. As soon as there was any market to sell his bonds he sold out, and purely out of timidity, because he would say, I don't know anything about this stuff; now I have a chance to realize, and I am going to realize as soon as there is a market. There was no market until some time after it was a fixed fact that they were going to build the road through.

182 Q. I understand you to say you don't know how many bonds you got nor how much security.

A. No; I don't know; the books will tell. Smith could show those books. It is all down as a matter of record; Greeley, so many first-mortgage income bonds and stock.

183 Q. What was the amount of the subscription for the third contract beyond Fort Riley?

A. I don't think the Shoemaker, Miller & Co. contract amounted to two millions. The first contract was two millions, of which the Eastern parties had a million and our party a million, and I think only a million and seven hundred thousand dollars to be paid on the Shoemaker, Miller & Co. contract—that is, according to my recollection.

184 Q. And they used that money with the Government bonds to build the road?

A. Yes, sir.

Redirect examination by JOHN R. SHEPLEY, Esq., counsel for pl't'ff:

161 185 Q. You have spoken of Thompson & Perry being the trustees — held a certain amount of stock; did they hold it for the company?

A. They held it as trustees for the parties subscribing for R. M. Shoemaker.

186 Q. Did Mr. Dillon buy any income bonds after he became director of this road?

A. I couldn't say whether he did or not.

187 Q. Wasn't the income bonds purchased by Jay Gould paid for in consolidated bonds of the company?

A. That he bought of us?

188 Q. Yes.

A. No, sir; he bought us all out, what interest we had in that pool, which consisted of income bonds, first land grants, second land grants, Leavenworth branch, and these chips and whet-stones and bitch pups, as I told him, and stock in the pool together, and he bought us all out at a stipulated price and paid us the money.

189 Q. When you speak of the pool you mean the association of all who entered in 1878?

A. Between three and four million dollars of this stock and the securities of the Kansas Pacific railroad—that is the pool I speak of.

190 Q. Did he continue to purchase income bonds after that?

A. As I said, I think, when they got up, they appreciated rapidly, and I think, when they got up to 18 and 19, somebody told me that Gould was out of the market, but I can't say for certain he was, you know.

191 Q. Do you know of any sales having been made to him or to Mr. Dunham or to other persons who were directors of the company of income bonds of this company?

A. No, I don't know as I recollect of any; Gould was a director at the time he was buying them, though; I have no doubt Dillon had an interest in it, but I can't state that for a fact; he was always ready to go in where Gould was going in; he was only the mouth-piece of Gould—that is all he is.

192 Q. Have there been large sales in the market, as far as
162 you know, since 1878?

A. Yes, sir; there was a good many changed hands; bought pretty rapidly and freely.

193 Q. If that amount contracted to be paid to the contractors on the contract of October 1st, 1866, is exorbitant, can you state any difference between the consideration which was given the contractors under that contract — for other constructions of the road—why one part of it should be considered to be not void rather than another?

A. I don't know of any part that should be void; I don't think any of it should be void; it is all considered a good contract.

194 Q. Is there any reason that you know of why the company had a right to repudiate the income bonds any more than the first-mortgage bonds?

A. No; no more right to repudiate than I have of my own note.

C. S. GREELEY.

163 Bonds of $1,000.
" " 250.
& bonds of 100.

Bonds on 128.6 miles to be issued to R. M. S. & Co.
" " 290 " " " " " S. M. & Co.

Income Bonds.

Issues on 385 miles of main line.
" " 31.6 " " Leavenworth branch.
And " " 2 " " Wyandotte spur.

Total, 418.6 " at $10,000 per mile=$4,186,000.

1867.

Jan'y 1. Received from lithographer income bonds of
$1,000 each, No. 1 to 1,146 inc., 1,146 bonds ---- $1,146,000
Of $250 " 1 " 400 " 400 " ---- 100,000
" $100 " 1 " 400 " 400 " ---- 40,000

To be issued to R. M. Shoemaker & Co.

Feb. 15. Bonds of $1,000, signed by John D. Perry, president, & C. S. Greeley & Adolphus Meier, trustees, No. 1–No. 500, inclusive, 500 bonds, sealed.

Mar. 25. Bonds of $1,000, No. 501–1146, signed, sealed, and executed.
" " Bonds of $250, No. 1–400, executed & signed by trustees, 400 bonds.
Bonds of $100, No. 1–400, executed & signed by trustees, 400 bonds.

Ap'l 1. Ten coupons, Nos. 1 to 10, inclusive, extracted from all the above bonds & deposited in safe of company.
Bonds 1–1146 of $1,000; 1 to 400 of $250, and 1 to 400 of $100, deposited in safe of Co.

164 7 per cent. per annum int. in currency—
Constituting a 3rd mortgage on main line @ $10,000 per mile, and constituting a 2nd mortgage on Leav'th branch @ $10,000 per mile.
Adolphus Meier and Carlos S. Greeley, trustees.
Bonds dated June 1st, 1866, interest to commence 5 years from date and to be paid out of "net earnings."

165 & 166 *Income Bonds. Ac. R. M. S. & Co.*

1867.

April 11. Retained for issue to Western parties in interest ac. R. M. Shoemaker & Co.—

Bonds of	$1,000, No. 1–598	$598,000
"	250, No. 1–100	25,000
"	100, No. 1–105	10,500
Total		$633,500

Coupons for 5 years, No. 1–10, inclusive, cut off and deposited, cancelled, in safe of company — St. Louis.

April 11. Sent by Adams Express to J. C. Reiff, Philad'a, for issue ac. interest in contracts of R. M. S. & Co.—

Bonds of	$1,000, No. 599–931	$333,000
"	250, No. 101–215	28,750
"	100, No. 106–225	12,000
Total		373,750

The above list includes $19,000 in bonds to be delivered to Thomas A. Scott.

From the above list there was retained in my hands for issue to Wm. J. Palmer, trustee for Wm. J. Palmer, F. H. Jackson, & R. H. Lamborn, on an interest of $5,000 each, the following bonds:

Bonds of	$1,000, No. 599–602	4,000
"	250, No. 101–117	4,250
"	100, No. 106–117	1,200
Total		$9,450

167 *Income Bonds.*

1867.

April 11. Sent by express to J. N. Kinney, Cincinnati, the following income bonds for issue to Ohio parties in interest:

Bonds of	$1,000, No. 932–1146, inc.	$215,000
"	250, No. 216–400, "	46,250
"	100, No. 226–400, "	17,500
		$278,750

Date.	Name.	Residence.	Number of bonds.			Total amount.
			$1,000.	$250.	$100.	
1867.						
April 10	Henry Martin	76 Mulberry St., Cin.	1–31	1–2	1–2	$31,700
" "	George Partridge	St. Louis	32–46	3–5	3	15,850
" "	H. C. Creveling	St. Louis	47–49		4	3,100
" "	" for D. R. G.	"	50–52		5–6	3,200
" 11	C. S. Greeley	"	53–112	6–16	7–12	63,350
" "	Thos. L. Price	Jefferson City	113–168	17–33	13–24	61,450
" 15	James Archer	St. Louis	169–198	34–37	25–31	31,700
" "	Alex. C. Anderson	"	199–203	38–40	32–37	6,350
" 18	Jno. D. Locke	New York	204–218	41–43	38	15,850
" 19	Rob't E. Carr	St. Louis	219–229	44–48	39–42	12,650
" "	John D. Perry	"	230–365	49–53	43–44	137,450
" 20	D. C. Freeman, att'y for G. C. S.	"	366–370	54–56	45–50	6,350
" 22	Geo. D Hall	"	371–379	57–58		9,500
" 25	Glover & Shepley	"	380–390	59–63	51–54	12,650
" 27	James Smith	"	391–395	64–66	55–60	6,350
" "	D. B. Gale	"	396–400	67–69	61–66	6,350
" 29	Giles F. Filey	"	401–472	70–75	67–72	74,100
June 12	O. D. Filey	"	473–486	76–80	73–78	15,850
May 23	Horace Holton	"	487–500	81–85	79–84	15,850
April 19	S. M. Edgell	"	501–544	86–89	85–90	45,600
May 2	Adolphus Meier	"	545–585	90–92	91–97	42,450
" 20	Jno. F. Usher	Terre Haute	586–596	93–97	98–101	12,650
" 31	William Myers	St. Louis	597–598	98–100	102–105	3,150
	Total					$633,500

All the above bonds had 5-years coupons extracted previous to issue.

169 *Income Bonds.*

170 Ac. R. M. S. & Co. (Issues, Philad'a.)

Date.	Name.	Residence.	Number of bonds.			Total amount.
			$1,000.	$250.	$100.	
1867.						
April 19	Wm. J. Palmer *et al.*	St. Louis	599–602	101–117	106–117	$9,450
" 26	J. Edgar Thomson	Philadelphia	603–662	118–128	118–123	63,350
May 1st	Seyfert, McManus & Co.	"	663–722	129–139	124–129	63,350
April 17	M. W. Baldwin & Co.	"	72*a*–792	140–159	130–139	76,000
May 15	J. B. Anderson	"	793–840	160–169	140–141	50,700
April 18	Wm. Thaw	Pittsburg	841–854	170–174	142–147	15,850
" "	H. H. Houston	Philadelphia	855–868	175–179	148–153	15,850
" "	W. F. Leech	"	869–882	180–184	154–159	15,850
" "	Thos. S. Clarke	Pittsburg	883–896	185–189	160–165	15,850
" "	Thomas A. Biddle	Philadelphia	897–910	190–194	166–171	15,850
" "	Edward Miller	"	911–921	195–199	172–175	12,650
	Total					$354,750
" "	T. A. Scott	Philadelphia	922–931	200–215	176–225	19,000
						$373,750

Five-years coupons extracted from all the above bonds previous to issue.

Date.	Name.	Residence.	Number of bonds.			Total amount.
			$1,000.	$250.	$100.	
1867.						
April 12	H. W. Wissman	St. Louis	932–937	216	226	$6,350
" 16	R. W. Strader	Cincinnati	938–943	301	227	6,350
" "	Alfred Gaither	"	944–959	312–319	244–253	19,000
"	B. E. Smith	Columbus	960–961	322–324	256–259	3,150
"	Harvey Bancroft	"	962	331–332	268–271	1,900
" "	J. H. Rhodes	Cincinnati	963–964	302–304	228–231	3,150
" "	J. N. Kinney	"	965–976	305	232–235	12,650
" "	E. W. Woodward	"	977–978	306–308	236–239	3,150
" 17	P. H. Kilgour	"	979–980	309–311	240–243	3,150
" 20	Wm. Dennison	Columbus	981–986	320	254	6,350
" 22	B. S. & W. C. Brown	"	987–992	321	255	6,350
" 19	J. R. Swan	"	993–994	325–327	260–263	3,150
"	D. S. Gray & Jas. Means	"	995–996	328–330	264–267	3,150
" 26	S. Medbury	"	997	333–334	272–275	1,900
"	T. Lough	"	998	335		1,250
" 17	A. H. Lewis	Cincinnati	999–1000	337–339	280–283	3,150
" "	Thos. L. Jewett	Steubenville	1001–1027	340–341	284–285	27,700
"	Geo. W. McCook	"	1028–1030	342–344	286–287	3,950
"	H. J. Jewett	Zanesville	1031–1045	345–347	288	15,850
" 18	R. M. Shoemaker	Glendale	1046–1100	348–356	289–292	57,650
" 22	Wm. H. Clement	Cincinnati	1101–1105	357–361	293	6,350
" "	L. Devinney	"	1106–1109	362–368	294–299	6,350
" 18	J. W. Kirk	"	1110–1113	369–375	300–305	6,350
" "	Larz. Anderson	"	1114–1116	376–384	306–316	6,350
" 22	J. M. Davison	Saratoga, N. Y.	1117–1120	385–391	317–322	6,350
May 1	J. Harshman	Dayton, O.	1121–1123	392–400	323–333	6,350
	Carried forward					$227,400

173–174 *Income Bonds. Ac. R. M. S. & Co. (Issues, Ohio)*—Continued.

Date.	Name.	Residence.	Number of bonds.			Total amount.
			$1,000.	$250.	$100.	
1867.						
	Brought forward					227,400
May 1st	Simon Gebhart	Dayton, O.	1124–1126	217–225	334–344	6,350
" "	V. Winters & Son	" "	1127–1129	266–234	345–355	6,350
" 3	Ashbell Green	New York	1130–1132	235–243	356	6,350
" "	" "	" "	1142			
April 19	Thomas Sherlock	Cincinnati	1133–1135	244–252	367–377	6,350
" 24	A. H. Barney	New York	1136–1138	253–261	378–388	6,350
	Andrew Gross	"	1139–1141	262–274	389	6,350
" 18	Geo. H. Pendleton	Cincinnati	1143–1144	275–277	357–360	3,150
" 21	Chas. P. Cassilly	"	1145	278–284	362–365	3,150
" 18	W. A. Goodman	"	1146	285–291	390–393	3,150
" "	A. L. Mowry	"		292–300	394–400	3,150
" "	"	"			361 and 366	
"	Walstein Failing	Columbus		336	276–279	650
						$278,750

Five-years coupons extracted previous to issue.

Total issues to R. M. Shoemaker & Co. as follows:

St. Louis parties	$633,500
Philad'a "	354,750
Ohio "	278,750
T. A. S.	19,000
	$1,286,000

175 & 176 *Income Bonds. Shoemaker, Miller & Co.*

Received from lithographer, duly numbered, the following blank income bonds—

Of	$1,000	bonds,	Nos.	1147	to	3900, inc., 2754	$2,754,000
"	250	"	"	401	to	1101, " 701	175,250
"	100	"	"	401	to	1001, " 601	60,100
							2,989,350

From 135th m. p. to $393\frac{15}{16}$ m. p.=$258\frac{15}{16}$ miles main line & 39.9625 miles east of Lawrence, as per contract.

(Total issue of income bonds = $4,275,350 = 427.5350 miles =
{ 393.9375, main line; 31.6000, Leav. branch; 1.9975, Wyandotte spur. }

1868.

Nov. 25. Delivered to Mr. Perry and taken by him to be signed, Nos. 1147 to 1950, inc., of $1,000 bonds— 804 bonds.
" 26. Nos. 1147 to 1700, inclusive, returned by Mr. Perry, signed, and deposited in safe of Co.— 554 "
" 27. Nos. 1701 to 1950, inc., returned by J. D. Perry, signed, & deposited in safe of Co. ---------- 250 "
" " Delivered to John D. Perry for his signature, bonds Nos. 1951 to 2050, inc.---------- 700 "
" 28. Nos. 1951 to 2301, inc., returned by Mr. Perry, signed, & deposited same in safe---------- 351 "
" " Delivered to Mr. Perry for his signature bonds Nos. 2651 to 3200, inc.---------- 550 "
" 30. Nos. 2302 to 2650, inc., returned by Mr. Perry, signed, & deposited in safe---------- 349 "
" " Nos. 2651 to 2850, inc., returned by Mr. Perry, signed, & deposited in safe ---------- 200 "
" " Nos. 2851 to 3200, inc., returned by Mr. Perry, signed, & deposited in safe ---------- 350 "
" " Mr. Perry signed 3201 to 3700---------- 500 "

177

Ja'y 25. Sent to Mr. Meier for his signature bonds 1147 to 1700, inc.; ret'd signed by Mr. Greeley.
Feb. 1. Signed by Messrs. Meier & Greeley, 1701–1950; ret'd.
Sent to Mr. Meier, 1951–2300 } ret'd.
" " 2301–2650 }
" " Delivered to Mr. Greeley 1951–2300; returned.
" 2. Sent to Mr. Meier 2651–3200; ret'd.
" " 3201–3700; ret'd.
" " Delivered to Mr. Greeley 2301–2650; ret'd.
Sent to Mr. Meier Nos. 401 to 1400 of 250; ret'd.
" " " 401 to 1360 of 100; ret'd.
Delivered to Mr. Greeley 2651 to 2850; ret'd.
" " 2851 to 3200; ret'd.

178 & 179

1869.
M'ch —. Income bonds of following numbers, duly signed by pres't & trustees & sealed with seal of company:

Of $1,000,	Nos. 1147 to 3900, inc.	$2,754,000
" 250,	Nos. 401 to 1101, "	175,250
" 100,	Nos. 401 to 1001, "	60,100
		$2,989,350

180 & 181

1869.
M'ch 20. Delivered to C. S. Greeley, chairman, S. M. & Co., income bonds as follows, in full — of bonds due s'd contractors, with coupons Nos. 16 & following attached:

Bonds of $1,000,	Nos. 1147 to 3900, inc.	$2,754,000
" 250,	Nos. 401 to 1101, "	175,250
" 100,	Nos. 401 to 1001, "	60,100
		$2,989,350

182 *Memorandum.*

Income bonds stamped subordinating interest to payment of interest on loan of $6,500,000 in m'l'ge, dated June 20th, 1869.

1869.

Dec —. Stamped by	C. B. Lamborn	$2,102,700
"	T. F. Oakes	387,600
"	J. C. Reiff	1,553,150
	Total stamped to Dec., 1869	$4,043,450

1871.

M'ch 27. Add'l stamped by J. C. Reiff, New York:		
Nos. 1929 to 1932, of $1,000		$4,000
Nos. 520, 678, & 679, of $250		750
Nos. 493 to 498, of $100		600
		5,350

183 *Income Bonds. Shoemaker, Miller & Co.*

Names.	Bonds.			Amount.
	$1,000.	$250.	$100.	
F. W. Meister	3131–3139	901–906	939–940	10,700
O. D. Filley	3140–3196	907–916	941–942	58,700
S. R. Filley	3197–3215	917–924	943–946	21,400
John D. Locke	3216–3239	925–932	947–953	26,700
E. & T. Fairbanks	3240–3289	934–944	954–957	53,150
A. Meier, trustee	3290–3297	945–950	958	9,600
J. C. Rust	3298–3305	951–956	959	9,600
C. S. Greeley	3313–3381		967–970	69,400
R. E. Carr	3382–3482		971–974	101,400
James Archer	3483–3567	969–978		87,500
J. R. Shepley	3568–3575	979–988	975–976	10,700
Barton Bates	3576–3658	989–996	977–980	85,400
A. C. Anderson	3659–3667	997–1002	981–982	10,700
D. B. Gale	3668–3676	1003–1008	983–984	10,700
J. P. Collier	3677–3684	1009–1018	985–986	10,700
G. D. Hall	3685–3714	1019–1026		32,000
J. F. Comstock	3715–3739	1027–1032	987.988	26,700
Jos. O'Neil	3740–3747	1033–1042	989–990	10,700
E. J. Mitchell	3748–3752	1043–1052		7,500
Charles Euslin	3804–3808		995–997	5,300
C. B. Burnham	3809–3813		998–1000	5,300
S. T. Glover	3814–3823	1063–1064	1001	10,600
J. P. Usher	3753–3803	1053–1060		53,000
T. J. Bartholow	2315–2355	805–810	902–903	42,700
J. W. & W. J. Lewis	2263–2314	801–804	898–901	53,400
Barney & Smith	2004–2019			16,000
184				839,550
Enoch Pratt	1958–1967	701–702	701–702	$10,700
Thomas Wilson	1968–1977	703–704	703–704	10,700
S. Gebhart	1978–1987	705–706	705–706	10,700
V. Winters & Son	1988–2003			16,000
C. H. Kilgour	2020–2023	787–790	760–784	7,500
R. M. Shoemaker	2024–2100		801–830 & 711	80,100
Seth Evans	2101–2137		707–710	37,400
J. N. Kinney	2138–2166	707–708	713–715	29,800
B. F. Strader	2167–2175	709–727	716–724	14,900
W. H. Clements	2176–2185	771–786	751–759	14,900
Lars Anderson	2186–2195	791–794	831–869	14,900
P. Andrew	2196–2200, 2259–2262	795–800	785–800 & 712, 870–897	15,000
Clason & Morse	2201–2235	729–736	720–733	37,400
L. A. Green & Co.	2236–2242		725–729	7,500
Alfred Gaither	2243–2247	737–744	734–738	7,500
G. Y. Roots	2248–2252	745–752	739–743	7,500
Bartlit & Smith	2253–2258	753–770	744–750	11,200
S. M. Edgell	2356–2407	811–814	904–907	53,400
B. W. Lewis, Jr.	2408–2484	815–822	908–918	80,100
Thos. L. Price	2485–2588	823–832	919–921	106,800
Wm. M. McPherson	2695–2798	1062, 835–844		106,750
Jas. B. Eads	2799–2902	1070, 845–854		106,750

Income Bonds. Shoemaker, Miller & Co.—Continued.

Names.	Bonds.			Amount.
	$1,060.	$250.	$100.	
Henry Martin	2903–3006	1061 855–864		106,750
Giles F. Filley	3007–3083	865–876	934	80,100
Jno. D. Perry	3084–3112	877–888		32,000
H. W. Wissman	3113–3121	889–894	935–936	10,700
A. C. Erfort	3122–3130	895–900	937–938	10,700
				1,027,750
185 Adolphus Meier	2589–2694	833–834	922–924	106,800
James Young	1147–1156	401	401–404	10,650
Thos. A. Biddle	1157–1209	402	600	53,350
R. D. Barclay	1210–1219	404	405–408	10,650
J. B. Anderson	1220–1368	405	409–410	149,450
M. W. Baldwin & Co.	1947–1953 1369–1468	406–445	411–414	117,400
Geo. Burnham	1469–1478	474	415–418	10,650
Jos. Cabot	1479–1488	475	419–422	10,650
Jas. S. Cox	1489–1498	476	423–426	10,650
Wm. Colder	1499–1506	477–485	427–430	10,650
J. D. Cameron	1507–1532	486–487	431–432	26,700
H. H. Houston	1533–1558	488–489	433–434	26,700
H. J. Lembaret	1559–1564	490–505	435–441	10,700
W. F. Leech	1954–1956 1565–1584	506–513	442–458	26,700
J. B. Montgomery	1587–1636	526–537	459–462	53,400
S. S. Moore	1637–1641	538–557	463–469	10,700
Syfert, McManus & Co.	1642–1731	558–607	601–643	106,800
D. E. Small	1732–1751	608–511	644–647	21,400
T. A. Scott, trustee	1752–1775	612–619	648–654	26,700
J. Edgar Thompson	1942–1946 1776–1765	620–649	655–697	106,800
Wm. Thaw	1866–1889	670–677	470–476	26,700
J. Craig Miller	1929–1932	678–680	493–498	5,350
W. J. Palmer, trustee	1957–1585–1586 1937–1941	689–700–650 669–514–525 403–446–473	548–594	30,950
A. H. Barney	1919–1928		486–492	10,700
N. Green	1890–1918		477–485	29,900
E. Miller	3829–3836	958	960–961 932–933	10,650
C. S. Hinchman	3837–	959–960	962–963	34,700
				1,056,450
186 C. Kilmer	3881–3890	1071–1086 & 1087	966–546–547 928–930 & 965	14,950
Isaiah Blood	3891–3900	933 & 1088–1101	599–698–700 991–994–595	14,950

Income Bonds. Shoemaker, Miller & Co.—Continued.

Names.	Bonds.			Amount.
	$1,000.	$250.	$100.	
E. D. Kennedey	3871–3880	1069 961–968– 1065	964	13,350
C. P. B. Jeffreys	3306–3312 3824–3826	957	925–931	10,650
J. C. Reiff, trustee	1933–1936	681–688	499–547 698–700	11,200
				65,100
				1,056,450
				1,027,750
				839,550
				2,988,850

[In pencil:] Above copied from T. J. Oakes' statements. $500 not accounted for. Probably error of Oakes' clerk in compiling statement. See Oakes about it.
(Signed) C. B. L.

Endorsed: Exhibit A to depositions of C. S. Greeley, May 20, '82. L. L. Walbridge, notary public.

187 *Parties in Interest in the Firm of R. M. Shoemaker & Co.*

John D. Perry	217,000 00	112,840 00
C. S. Greeley	100,000 00	52,000 00
G. F. Filley	117,000 00	60,840 00
F. L. Price	97,000 00	50,440 00
S. Edgell	72,000 00	37,440 00
A. Meier	67,000 00	34,840 00
J. P. Usher	20,000 00	10,400 00
James Archer	50,000 00	26,000 00
Henry Mastin	50,000 00	26,000 00
Geo. Partridge	25,000 00	13,000 00
O. D. Filley	25,000 00	13,000 00
J. D. Locke	25,000 00	13,000 00
H. Holton	25,000 00	13,000 00
R. E. Carr	20,000 00	10,400 00
Glover & Shepley	20,000 00	10,400 00
Geo. D. Hall	15,000 00	7,800 00
A. C. Anderson	10,000 00	5,200 00
D. B. Gale	10,000 00	5,200 00
James Smith	10,000 00	5,200 00
G. C. Swallow	10,000 00	5,200 00
D. R. Garrison	5,000 00	2,600 00
H. C. Crevling	5,000 00	2,600 00
William Myers	5,000 00	2,600 00
	1,000,000 00	520,000 00

Amount forward	1,000,000 00	520,000 00
J. E. Thompson	100,000 00	52,000 00
Sayfett McMeans	100,000 00	52,000 00
Col. J. B. Anderson	80,000 00	41,600 00
W. W. Baldwin & Co.	120,000 00	62,000 00
188 Thomas R. Biddle	25,000 00	13,000 00
Thomas S. Clarke	25,000 00	13,000 00
William Shaw	25,000 00	13,000 00
H. H. Houston	25,000 00	13,000 00
W. F. Leech	25,000 00	13,000 00
Edward Miller	20,000 00	10,400 00
R. H. Lamborn	5,000 00	2,600 00
F. H. Jackson	5,000 00	2,600 00
William J. Palmer	5,000 00	2,600 00
R. M. Shoemaker	91,000 00	47,320 00
Thomas L. Jewett	43,750 00	22,750 00
Alfred Gaither	30,000 00	15,600 00
H. J. Jewett	25,000 00	13,000 00
J. K. Kinney	20,000 00	10,000 00
Thomas Sherlock	10,000 00	5,200 00
William Dennison	10,000 00	5,200 00
Wm. H. Clement	10,000 00	5,200 00
A. H. Barney	10,000 00	5,200 00
Andrew Gross	10,000 00	5,200 00
L. Davinney	10,000 00	5,200 00
J. W. Kirk	10,000 00	5,200 00
Lary Anderson	10,000 00	5,200 00
	1,849,750 00	961,870 00
Amount forward	1,849,750 00	961,870 00
P. W. Strader	10,000 00	5,200 00
J. M. Davidson	10,000 00	5,200 00
Theodore Cook	10,000 00	5,200 00
J. Harshman	10,000 00	5,200 00
Simon Gebhardt	10,000 00	5,200 00
189 V. Winter & Son	10,000 00	5,200 00
B. L. & W. C. Brown	10,000 00	5,200 00
E. W. Woodward	5,000 00	2,600 00
B. E. Smith	5,000 00	2,600 00
J. H. Rhoades	5,000 00	2,600 00
A. L. Lewis	5,000 00	2,600 00
J. R. Swan	5,000 00	2,600 00
D. S. Grey & Jas. Means	5,000 00	2,600 00
W. A. Goodman	5,000 00	2,600 00
G. H. Pendleton	5,000 00	2,600 00
A. L. Mowry	5,000 00	2,600 00
C. H. Kilgorer	5,000 00	2,600 00
G. W. McCook	6,250 00	3,250 00
H. Bancroft	3,000 00	1,560 00
S. Medbury	3,000 00	1,560 00

W. Failing	1,000 00	520 00
Chas. R. Capilly	5,000 00	2,600 00
Ashby Green	10,000 00	5,200 00
J. Lough	2,000 00	1,040 00
	2,000,000 00	1,040,000 00

Pro rata distribution of 52 per cent.

Exhibit B to dep. of C. S. Greeley, May 22, '82. L. L. W., N. P.

190 J. D. PERRY, of lawful age and sound mind, having been by me first carefully examined, cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matter in controversy, did thereupon depose, testify, and say as follows:

Direct examination by Mr. SHEPLEY:

1 Q. Were you at any time connected with the Union Pacific railroad, Eastern Division, afterwards called the Kansas Pacific Railway Company?

A. Yes, sir.

2 Q. What time did you become so connected?

A. In the fall of 1863, I think, I was first connected with it, but not until 1864 officially, however.

3 Q. Was there at any time an agreement entered into by the Union Pacific Railway Company, Eastern Division, for the construction of that road?

A. Yes, sir.

4 Q. How many contracts in relation to the construction were made?

A. There was one for the first 140th mile post, one for the branch from Leavenworth to Lawrence Junction, and there was an additional one from the 140th mile post westwardly, covering 250 additional miles, I believe, and then an additional one from that point to Denver, making four contracts.

5 Q. Was not the last construction contract you mentioned made by the company itself without the intervention of any contract?

A. Yes, sir.

6 Q. Then there were three for the construction of the road?

A. Three; yes, sir.

7 Q. Do you recollect the date of the first one?

A. It was some time in 1865; I don't recollect the exact date.

191 8 Q. For the construction of the Leavenworth branch, was that made at the same time?

A. It was about the same time—about the first day of July, 1865.

9 Q. Do you recollect the date of the contract from the first 140th mile post?

A. It was October, 1866.

10 Q. Will you state what the condition of the road was just before the first contract, and of the country as to the practicability of getting the road built, and the difficulties attending it?

A. The difficulties attending the second division from the first

140th mile post were regarded as dangerous and troublesome; I recollect that in making the surveys.

11 Q. What sort of a country did it pass through from the 140th mile post on to Denver?

A. It was then considered a barren country after passing Salina.

12 Q. Was it inhabited or uninhabited?

A. Uninhabited; there was only one settlement of any consequence after passing Fort Riley, and that was at Salina.

13 Q. Where did the contract terminate that was made on the first day of October, 1866—where did they leave the road?

A. It was at a point near Fort Wallace—you mean the second contract on the direct line?

COUNSEL: Yes.

A. It was east of Fort Wallace and not far from what is now Sheridan—about 5 or seven miles east of Sheridan?

15 Q. Did the road terminate at any particular place, or out on the prairie?

A. It terminated where there was nothing; it was a barren waste.

16 Q. Did you find any difficulty in regard to water, or was there supposed to be any difficulty at the time in regard to water?

A. We went to the point at which we stopped for the purpose of getting water. At some seasons of the year there was a stream
192 there; I don't think there was any serious difficulty about water. We made an effort, I recollect, to get to the Cheyenne wells from that point on account of supposing there was a greater abundance of water, but it was not found to be so.

17 Q. What position did you hold in the company?

A. I was president of the company at that time.

18 Q. How long did you continue to be president?

A. From the first time of my election—you mean the whole time?

COUNSEL: Yes.

A. I believe it was about seven years.

19 Q. Do you recollect who succeeded you as president?

A. Robert E. Carr.

20 Q. Did you continue to be one of the directors?

A. I believe so; I wasn't here all the time, but I think I was all the time in the board.

21 Q. Do you recollect what was the consideration that was agreed to be given to the persons who entered into the agreement with the Union Pacific Railway Company, Eastern Division, for the construction of the road, from the 140th mile post to the 394th mile post, dated the first day of October, 1866?

A. Well, I don't recollect the amount, but I recollect it was to be in bonds—in money or Government bonds; I don't recollect which; but it was the bonds of the railroad company and the bonds of the Government, or money in its stead; income bonds and stock, I think, was the provision.

22 Q. Apart from the construction of the railroad from the 140th to the 394th mile post, was there any obligation entered into by the contractors for the payment of any sums of money due to prior con-

tractors for the Leavenworth branch and that part of the road east of the 140th mile post?

A. Yes, sir; I think there was; I see this paper with my name to it sets forth the facts; and I know there was a settlement spoken of, and this paper sets forth what it was.

193 23 Q. Do you recollect how much of the debt then due to the prior contractors was from the company?

A. Only from seeing this here I would not recollect; I see it is stated here at $450,000 to $500,000.

24 Q. What is your recollection about that; is that about the amount?

A. Since I see the contract, I of course recollect that there was such an arrangement, but I have no further recollection about the amount and I would not have known the amount otherwise.

25 Q. Was that amount paid by the contractors under the contract of the first of October, 1866, to the former contractors according to the agreement?

A. Yes, sir.

26 Q. By that agreement of the first of October, 1866, the contractors under that contract were entitled to receive a certain amount of income bonds; can you state what that amount was of income bonds and what other consideration there was under that contract for the payment by these contractors to the prior contractors the debt due by the railroad company?

A. I can only state it as I stated it before, from seeing this paper, that there were income bonds and stock paid, but I can't remember the amount; I believe that there was by the contract $400,000 of income bonds and $600,000 of the other; I will state, however, it is only from this contract that I can state that distinctly.

27 Q. Does your general recollection about the matter agree with that?

A. Yes; I knew that there was a settlement and payment made, but I couldn't have stated the amount without reference to the contract itself.

28 Q. What amount of income bonds of the Union Pacific Railway Company, Eastern Division, were the contractors under that contract of the first of October, 1866, entitled to receive?

A. $10,000 per mile of income bonds; that I recollect.

29 Q. Did the contractors under the contract of the first of October, 1866, receive the income bonds which by the terms of
194 that contract they were entitled to receive and hold from the company?

A. They received the amount they were entitled to receive under the contract.

30 Q. That is, they received $10,000 per mile and $400,000, which they were entitled to receive on their payment of the debts due to the company from the old contractors?

A. Well, I take that for granted.

31 Q. Do you recollect what time the income bonds and mortgage was made?

A. It was between the two contracts, I think; I think it must

have been in 1866; before the last contract and after the first contract.

32 Q. Did you, as president of the company, sign the income mortgage and the income bonds?

A. Yes, sir.

33 Q. After the construction of the road to the 394th mile post, what did the company do in relation to extending the road and constructing it from there to Denver?

A. Made a mortgage on the residue of the road for $6,500,000.

34 Q. Do you recollect what date that was?

A. No; it was in 1869, though, I reckon.

35 Q. Do you recollect to whom the mortgage was made?

A. It was made, I believe, to John A. Stewart, of New York; Adolphus Meier, John Edgar Thompson.

36 Q. Thompson is dead?

A. Yes, sir; he died not long after.

37 Q. Did you find any difficulty in relation to the selling of the mortgage bonds of the Denver extension mortgage and extending the road; and, if so, what?

A. I found plenty of difficulties in negotiating the mortgage bonds.

38 Q. Was there any difficulty from the fact that this income mortgage was upon the road?

A. Yes; that was one of the difficulties I recollect.

39 Q. State what it was.

195 A. It was the income mortgage, it was supposed, covered the whole line of the road and would have been a mortgage if nothing had been done upon the property—that is, the mortgage made on this six millions and a half would have been a second mortgage.

40 Q. Could the company have gone on and negotiated the bonds secured by the Denver extension mortgage and completed the road without in some way taking care of the income mortgage and the bonds secured thereby?

A. It was thought not; that they could not have done it.

41 Q. What did the company do under those circumstances?

A. They made application to the holders of the income bonds to subordinate them.

42 Q. Subordinate them to what?

A. To the $6,500,000 to be issued in new bonds upon the line of the road, and the company proceeded by application to all the parties that could be found and it was agreed to except about 275 bonds, I believe.

43 Q. Was that subordination a *sine que non* to the completion of the road and so regarded at the time by the company?

A. Yes, sir; it enabled us to sell the bonds by providing in the new mortgage that those that were not subordinated should be provided for by the trustees of the extension mortgage, as it was called, and that was provided for in the mortgage.

44 Q. At the time of the making of these three construction contracts that you have already testified to, how was it in regard to the knowl-

edge of all of those holding the stock of the road as to these contracts, did they know of those contracts or not—that is, did the stockholders of the company know of these contracts or not?

A. It seems to me they did; if there was an exception it couldn't have been but very few.

45 Q. Do you recollect of any exception to that of persons who held stock of the company who did not know perfectly well of the making of these contracts?

196 A. I know of none; I can't state any now; if there was any I don't know it.

46 Q. Had you anything to do with the agreement in relation to the taking of stock by Leavenworth county?

A. Yes, sir; I had something to do with it; I can't state what. I was one of the board of directors and president of the company, and knew that Leavenworth county agreed to issue $250,000, I think, of their bonds for that amount of stock in the company.

47 Q. Did you recollect at the time this agreement was made with the county commissioners in regard to this stock whether there was any conversation in regard to what measures the company had taken as to the construction of the Leavenworth branch and as to the construction of the road?

A. No; I was doubtless conversant with that, but I can't state that now.

48 Q. You were in Washington a good deal at this time, were you not?

A. Yes; I was a good deal of the time.

49 Q. As to the general notoriety of these contracts can you state whether any measures were taken to keep them secret or whether they were perfectly well known to everybody who took an interest in the matters of the road?

A. I think everybody who took an interest in the road knew of the contracts. I don't think we took pains to have them made public, but I think persons interested knew of them. We had circulars sent all over the country soliciting subscriptions and that made them public.

50 Q. Did you ever hear any objection made by any owner of the stock of the company to these contracts at that time?

A. I did not.

51 Q. What was the state of the facts in regard to these contracts in all of these construction contracts as to their being the same persons who owned the stock; do you know anything about that?

A. All the contractors were stockholders owning stock; there were persons that owned stock and bonds that were not con-

197 tractors, but I am satisfied that all the contractors were stockholders and all shared with those that were not contractors alike in the division of the stock and other securities.

52 Q. Did you know of anybody who owned stock that either did not themselves become contractors for the extension of the road or did not know perfectly well what the contracts were that were made and were asked to become parties to these contracts?

A. I think that all the parties that took an interest knew what the contract was. There might have been such a case as this, and I will name it, because I do not want to be misunderstood. A, B, or C might have subscribed more than what he wanted, and another party may have become owners of a small amount, and such parties may not have known; and there was some divisions that the party receiving an interest in it might not have known, but the party subscribing did know and were conversant with it, and it was nearly all held by the original subscribers.

53 Q. At the time this subrogation was made to what extent had the income bonds gone out of the control of the original holders?

A. There had been considerable changes, but I can't tell what amount. I know we had a heap of trouble in finding some of the holders, but it was in cases where changes had been made. The larger amounts remained with the parties subscribing.

54 Q. How soon did the income bonds become a matter of sale on the open market; can you tell how soon after they came into the hands of the original holders?

A. They were offered by some as soon as they got them, I have no doubt. I know they did, because I bought myself.

55 Q. Were the parties to the contract of the first of December, 1865, and the parties to the contract of the first of October, 1866, the same?

A. No. The majority were, but there were some new parties in the second contracts.

198 56 Q. Were there parties under the contract of the first of July, 1865, that did not become parties to the contracts of the first of October, 1866?

A. Yes, sir; there was Mr. Jewett and Mr. Partridge and several others; I can't name them all, but I knew there were several.

57 Q. A considerable number?

A. Yes, sir.

58 Q. This dealing in the income bonds was well known to the company at the time and afterwards, or were they ignorant as to what the condition of things was?

A. Oh, no.

59 Q. Have you been connected with the company since 1877—I mean in an official capacity?

A. No; not since I sold my interest in 1878, I believe.

60 Q. Did you sell any income bonds at that time that you held?

A. Yes, sir.

61 Q. Do you know of any dealings since 1878 by the directors of the Union Pacific railway or by the consolidated companies in income bonds since that time?

A. Yes; in a general way I know several directors got the bonds.

62 Q. Income bonds as well?

A. Yes, sir.

63 Q. You are engaged in the banking business here, are you not?

A. Yes, sir.

64 Q. Since 1877 and 1878 what has been the general dealing in

the markets of the country in relation to these income bonds? Have they been bought and sold upon the markets of the country?

A. Yes, sir; land-grant bonds and other bonds have all been dealt in until recently; I know of none recently.

65 Q. When did you first hear any objection raised by this company to the validity of the income bonds?

A. I do not know; it is within a year, I should say.

66 Q. Prior to that time there had been a large sale in the
199 open markets, hadn't there?

A. Yes, sir.

67 Q. Do you know any reason why this Kansas Pacific Railway Co. should undertake to repudiate the income bonds more than the first-mortgage bonds given to these contractors?

A. No, sir; I do not.

68 Q. They form part of one and the same contract, don't they?

A. Yes, sir.

69 Q. Comprised of these different bonds of the company and stock of the company?

A. Yes, sir; I understand it so.

70 Q. Do you know who composed the board of directors of the company since you went out of the company?

A. I know some of the gentlemen, not all.

71 Q. Is Mr. Jay Gould one?

A. Yes, sir.

72 Q. And Mr. Sidney Dillon another?

A. Yes, sir.

73 Q. Do you know anything about whether Mr. Jay Gould dealt in and bought income bonds after 1878?

A. I only know by what has been told me; nothing of my own personal knowledge of his purchases.

74 Q. When you sold yourself you sold to him, didn't you?

A. Yes, sir; to him and Mr. Dillon; he was the active man who gave me the checks; a syndicate composed of Jay Gould, Sidney Dillon, and others during the time, in which Gould was a director of the company.

75 Q. Was Mr. Sage another director of the company?

A. He became so at the time, I think, and I think he was elected before, but perhaps not.

76 Q. Do you recollect what income bonds have been sold for on the market ever since 1878?

A. They have been selling all the way from 50 cents to one dollar.

Cross-examination by Judge USHER, counsel for defendant:

1 Q. Was there any other stipulation between the company and the contractors than as mentioned in the contracts themselves?

200 A. The contracts were reduced to writing, and they contained what the agreements were; that is my recollection.

2 Q. You don't want to be understood as saying that there is any other arrangement between the company and the contractors than as mentioned in the contracts?

A. No.

3 Q. Now, these contractors of 1865, they bear date July 1st—the first contracts?

A. Yes, sir.

4 Q. They were not in fact made then, but were dated back, were they not?

A. I don't recollect that.

5 Q. Did not the company make an order that they should be dated as of the first of July, and that the work previously done should be considered a part of it?

A. I remember that what work the contract-s done was a part of the contract, but I don't recollect whether the contract had to be dated back.

7 Q. I will ask you this question, if the records signed by you—records of the company—show they have been dated back, are the records correct?

A. Correct; yes, sir.

8 Q. Well, now, you and your friends had advanced towards this road, before you had any connection with the Eastern parties, over a million dollars—about one million and one hundred and eleven thousand dollars?

A. Yes, sir; I recollect, $1,111,000 or over.

9 Q. And the parties who advanced that became interested in the Shoemaker, Miller & Co. contract as so much money paid?

A. Yes, sir.

10 Q. He, then—Shoemaker and his parties here—brought in enough to make $2,000,000?

A. Yes, sir.

11 Q. And you got back out of the million they advanced enough to make you equal—so you stood in equal?

A. That is a fact according to my recollection.

12 Q. And then you recollect at the time that Scott said
201 "We would start solid," and that certain stock should be paid for in money to the company, should be regarded as having been paid for in money, and it amounted to—I don't recollect how much—but that stock, whatever it was, was issued, and the company agreed that so much was paid, and it was issued to you and John E. Thompson in trust for the contractors, whatever it might be?

A. Yes; I recollect some old stock was regarded as being subscribed before any of this.

13 Q. And it was issued to you and Thompson?

A. Yes; in trust.

14 Q. And the whole thing was cancelled upon the records, after a certain stock had been sold, and that stock issued under the contract made the whole stock that was out, didn't it?

A. That stock and the stock issued under the contracts, we presumed, would have made all that was out.

15 Q. And the company, during that time, never recognized any other stock?

A. They repudiated all other.

16 Q. They never recognized and flatly repudiated and denied any other out, didn't they?

A. Yes, sir.

17 Q. Now, when we came to fix up the contract for the building of the road beyond the 140 mile post as far as the Government bonds extended, we adopted the contract of 1866, didn't we?

A. Yes, sir.

18 Q. Do you remember about our fixing up the pool of subscribers at Pittsburg?

A. Yes; I recollect the making our subscribing there, but not the details.

19 Q. Well, that's about all we did, wasn't it.

A. Yes, sir.

20 Q. And we determined who would go in there; do you remember that Tom L. Jewett was there?

A. Yes, sir.

21 Q. And he declined to go in?

A. Yes, sir.

22 Q. He had been in the first?

A. Yes, sir.

23 Q. And Hugh Jewett wouldn't go in?

A. Yes, sir.

202 24 Q. And George McCook wouldn't go in, and some other Ohio parties would not?

A. Those were the ones who were prominent at all events.

25 Q. Scott was there, and he subscribed for Pennsylvania parties?

A. Yes, sir; Scott and McManus were there.

26 Q. Then after that was done we returned and prepared the contract?

A. I suppose that's the way of it.

27 Q. And then the parties paid up according to their subscription, mostly, I didn't pay all mine, but they mostly paid according to their subscription, and you were interested in all these contracts, were you not?

A. Yes, sir; in all the construction contracts.

28 Q. And the contractors knew it as well as yourself, didn't they?

A. Yes; the contractors knew I was interested.

29 Q. I state as I remember it, and if I don't state it according to your recollection you can stop me; then this stock and bonds, as provided by the contract, was issued by the company as the contract provided?

A. Issued by the company to the contractors; yes; these income bonds?

30 Q. Who was the auditor of the company—the book-keeper at the time?

A. I think at that time Palmer was auditor of the company; no, he was secretary and treasurer at that time. S. T. Smith was the auditor.

31 Q. When the company resolved to ask to have the income bonds

subordinated, were the directors of the company at that time parties that had been interested in these contracts mostly?

A. Yes, sir; they were parties to the contracts.

32 Q. Now I wish to have you correct this if I am wrong; except Devereux he never had any interest in the contracts.

A. No; he never had any interest in the company.

33 Q. But the others had as far as you know?

A. Yes; I believe they did

34 Q. And they held as far as you know the income bonds
203 which had been delivered to them?

A. Yes, sir; as far as I knew.

35 Q. You held yours at that time?

A. Yes, sir.

36 Q. And subordinated them?

A. Yes, sir; it may be that some of the directors had sold their income bonds; I don't mean to say they had not, but as far as I know the directors held most of those; I know we had been apportioned them under the contracts; I know I held mine.

37 Q. Was not the stock that was voted at the stockholders' meeting the stock that had been issued under these contracts and that had been, at one time, in trust with you and Thompson?

A. That's my recollection.

38 Q. Do you know of any other person desiring to vote at any time or participate in the corporate meetings, except the county of Leavenworth?

A. I recollect the county of Leavenworth did participate in those meetings; some of them. I don't know of any other stock, as long as Thompson and I held it, being voted; I think we voted it all. The county of Leavenworth, I recollect, did participate in some of the meetings; I don't know how many.

39 Q. Do you recollect who represented the county?

A. I recollect Mr. Eaton represented it once.

40 Q. Did Hynes represent it; wasn't he there with Eaton?

A. It is possible; Eaton I recollect distinctly, and, it is possible, the other party. I wasn't present at all the meetings, but one meeting I recollect particularly well, and whenever there was anything of much interest I tried to be there.

41 Q. Now these income bonds, after they were delivered, did they have any market value for a good while?

A. I think they were sold by some from the start, almost, at some price—very low price; I don't know how much; they run along about with the stock I think.

42 Q. Do you know of their having been put on the market—on the stock boards anywhere?

A. No, sir; no.

204 43. Q. They never were, were they?

A. Well, not to my recollection.

44. Q. Here is a list of stockholders that appear at the time the stock was increased (list read).

A. That is a meeting we held in Lawrence, and it was when my

family was in Europe. I know I went up and was very much interested.

45 Q. You know of no stock being issued or transferred except it had its root in either the stock you and Thompson held in trust or that which was issued to the contractors?

A. No; that's all I know of; we combined all the stock we were willing to acknowledge into that amount, which was transferred to Thompson and myself in trust, and then we commenced to issue the new stock, abrogating or setting aside the other.

46 Q. That stock which the company was willing to allow was counted upon and determined before the contracts were made with Shoemaker, wasn't it?

A. Well, we determined there was that much stock that had been issued.

47 Q. That was made known to Scott and Shoemaker?

A. Yes; they were parties because Thompson and I wouldn't have been associated if they hadn't agreed to it.

48 Q. And that particular stock was regarded as having been paid for in cash?

A. Yes; I think Mr. Glover fixed up that.

49 Q. Yes; I recollect Tom Scott said "Now there will be some question about this hereafter, and I wish to have a foundation, or nest-egg." Do you recollect something of that?

A. I recollect he placed reliance on that stock which had been paid for (referred to by you) in case of any emergency that might arise in reference to those different hundred claimants that we maintained were fraudulent.

50 Q. That the company recognized as full paid?

A. Yes, sir; that held by Thompson and myself.

51 Q. And regarded it as having been paid dollar for dollar?

205 A. Yes, sir; I think there was a record on the books of the company to that effect.

52 Q. Ashbell Green was here representing the Eastern parties and was their counsel, wasn't he?

A. Yes, sir.

53 Q. And he was at the same time, during that meeting, made a director, wasn't he?

A. I believe he was.

54 Q. And he had an interest in the contract of $10,000?

A. Well, the papers will show.

Redirect examination by Mr. SHEPLEY, counsel for the plaintiff:

1 Q. What Eaton was it you spoke of in Leavenworth?

A. Isaac E. Eaton, a brother-in-law of Jewett, one of the county commissioners.

2 Q. Where did the county of Leavenworth's stock come from?

A. It was the payment for the 250 bonds received by them; in payment of 250 bonds.

3. Q. And it was owned by the company, wasn't it?
A. Yes.
4 Q. Then the company, after issuing to the county of Leavenworth their stock, the company had stock in their own hands, and your idea is they issued what was coming under this contract of the first of July, 1865, they issued that stock to yourself and J. Edgar Thompson, as trustees for the contractors?
A. Yes, sir; my recollection is that it was placed in Thompson's and my hands for the purpose to keep up the equilibrium, to keep up the contract, so that it could not be violated, one representing the Eastern interest and the other the Western interest.

JOHN D. PERRY.

I certify that the foregoing is a true and faithful transcript of my short-hand notes of the depositions of Carlos S. Greeley and John D. Perry; that the same were subscribed and read over by
206 the witnesses and signed by them, and are herewith returned as their depositions in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 26th day of May, 1882.

[SEAL.] L. L. WALBRIDGE,
Notary Public, City of St. Louis.

Notary's fees, 36.20, paid by plaintiff.
Opened June 8, 1882, at the instance and request [of] Lucien Eaton, sol. for compl't.
Filed June 3, 1882.

A. S. THOMAS, *Clerk.*

[Endorsed:] No. 3437. B. W. Lewis, Jr., *vs.* The Kansas Pacific R'y Co. Depositions of C. S. Greeley and John D. Perry, for def't.

207 Agreement made and concluded this first day of July, A. D. eighteen hundred and sixty-five, between the Union Pacific Railway, Company, of Kansas, of the first part, and Robert M. Shoemaker, Edward Miller, Joseph C. Butler, Mathew Baird, Carlos S. Greeley, Giles F. Filley, James Archer, and Stephen M. Edgell, of the second part, witnesseth:

First. For and in consideration of the covenants and stipulations hereinafter mentioned to be performed by the party of the first part, the parties of the second part hereby agree to furnish all the materials and equipments, iron, rails, chairs, spikes, sleepers, timber, masonry, rolling-stock, and other material needed to build, construct, and equip for the party of the first part a first-class railroad, with the needful turnouts, from the town of Lawrence,
5 int. in Kansas, to Fort Riley, and telegraph line, &c.,
rev. stamp. substantially on the route which has been surveyed for said railroad company, reference being had to their maps, plans, and profiles; and to construct and build such first-class railroad, telegraph line, and appurtenances in the manner described in an act of Congress passed July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line

from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and the other acts of Congress passed in reference to said railway company, and to supply the depots, water-stations, engines, and cars in accordance with the terms of said acts of Congress complete as a first-class railroad; all to be done within the time in said acts specified.

Second. In consideration of the construction and equipment of said road and sidings, &c., as in the foregoing section mentioned, the party of the first part agrees to pay to the parties of the second, the survivor or survivors of them, the full sum of fifty thousand ($50,000) dollars per mile of main track measurement, as follows: twenty-five ($25,000) thousand dollars in the capital stock of the Union Pacific Railway Company, Eastern Division, for which full-paid certificates shall be issued, and in cash twenty-five thousand ($25,000) dollars, which said sum of fifty thousand ($50,000) dollars is to be paid *pro rata* in such certificates of stock and cash on the estimate of an engineer, to be designated for that purpose by the party of the first part, such estimate to be made every thirty days as the work progresses in proportion to the work done and materials furnished: Provided, That said company may retain fifteen per cent. of each estimate until each successive section of twenty miles is completed according to this contract; and full payment shall be made in accordance with the terms in this contract specified upon the completion and acceptance by the Government of the United States of each division of twenty miles.

5 int. revenue stamp.

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Third. It is further agreed by and between the parties hereto that all of the work under this contract and all materials shall be performed and supplied to the full satisfaction of the board of directors of the said Union Pacific Railway Company, and if the said parties of the second part, the survivor or survivors of them, shall fail to perform the work herein contracted to be done as fast as said board shall from time to time reasonably require, or shall do any of said work imperfectly or not in accordance with the acts of Congress aforesaid, then the party of the first part is authorized to terminate this contract, paying said party of the second part, the survivor or survivors of them, for the work actually done and material supplied only, and the said party of the first part may thereupon proceed to do the said work or to contract with any other party therefor, and no damage shall be claimed by the party of the second part, the survivor or survivors of them.

5 int. rev. stamp.

It is further fully understood and agreed that in case of a failure on the part of the parties of the second part, as mentioned in this section, then & thereupon the fifteen (15%) per cent. of the amount of the monthly estimate previously made shall be held and permanently retained by said parties of the first part as liquidated damages, and the said party of the second part, the survivor or survivors of them, shall make no claim therefor.

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Fourth. It is further understood that in the event of the death of

either or any of the parties of the second part this contract shall not thereby be terminated, but the surviving parties shall proceed to the completion of this contract without interference on the part of the personal representatives of the deceased party or parties; and in such case the party of the first part shall not be liable to account to or with the personal representatives of said deceased party, nor until the completion of this contract, and such accounting shall then be had between the party of the first part and the survivors of said deceased and not with his representatives.

5 int. rev. stamp.

Fifth. It is further agreed and understood that said parties of the second part shall have the control and use of the road, being liable for all expenses and entitled to the receipts therefrom, until the completion and equipment of said road to Fort Riley according to the terms of this contract, the said party of the second part carrying the mail, troops, and munitions of war, as required by law.

In testimony whereof the party of the first part have caused this agreement to be signed by their president and the corporate seal to be affixed, and the parties of the second part have hereunto affixed their hands and seals the day and year first above written.

R. M. SHOEMAKER. [L. S.]
GILES F. FILLEY. [L. S.]
C. S. GREELEY. [L. S.]
JAMES ARCHER. [L. S.]
JOSEPH C. BUTLER. [L. S.]
S. M. EDGELL [SEAL.]

5 int.
210 rev. stamp.

[SEAL.] JOHN D. PERRY, *Pres't.*

In the presence of—

—— ——.

Attest: JNO. P. DEVEREUX, *Sec'y.*

J. W. GRIFFITH,
Notary Public.

Endorsed: No. 1. No. 3437. Filed June 8, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy.

211 Agreement made and concluded on the first day of July, 1865, by and between the Union Pacific Railway Company, Eastern Division, the party of the first part, and Robert M. Shoemaker, Mathew Baird, Edward Miller, Joseph C. Butler, Carlos S. Greeley, Giles F. Filley, James Archer, and Stephen M. Edgell, the party of the second part, witnesseth:

First. The party of the second part agree and bind themselves to construct and equip a first-class railway as now located from the city of Leavenworth, in the State of Kansas, to the junction with the completed road of said company at or near the town of Lawrence, Kansas, with all the needful stations and necessary rolling-stock (not less than $150,000 in value) complete, as a first-class railway, as provided for by the charter of said company and the acts of Congress in relation thereto, to finish said

Stamp.

railway and deliver the same to said company in good running order on or before the first day of May, 1866.

Second. In consideration of the covenants to be performed by said party of the second part and set forth in the previous section the party of the first part agree to pay said party of the second part the full sum of six hundred thousand dollars in the first-mortgage seven per cent. bonds of said railway company based upon that portion of their road to be constructed under this contract, and also bonds of the county of Leavenworth to be issued by said county, amounting to two hundred and fifty thousand ($250,000) Stamp. dollars; also twenty-two thousand ($22,000) dollars per mile in full-paid capital stock of the Union Pacific Railway Company, Eastern Division, for the actual number of miles of railroad constructed between Leavenworth and the point of connection at or near Lawrence.

Third. It is agreed that the said company shall from time to time and as fast as shall be required by the said contractors make 212 sales and conveyances of the Delaware lands, at prices to be fixed by the said contractors, and shall appoint an agent to superintend and take charge of the said lands and to make such sales, which agent shall be satisfactory to the said contractors. Out of the proceeds of the sales of the said lands the said company shall pay and reserve the costs and the expenses of the said sales, including the services of the said agent and the amounts heretofore paid or which may become due, or for which the company is liable to the Government of the United States, for the said lands or on account thereof, and the residue of the said proceeds shall be paid to the said contractors as part of their compensation for the performance by them of their contract, and at the completion of this contract the said company shall transfer and convey to the said contractors the residue of the said lands unsold, subject to the payment of all moneys payable for or on account of the same to the Government of the Stamp. United States, the intention of the said company being to appropriate and dispose of the said lands for the benefit of said contractors and to secure to them the same and the proceeds thereof as compensation for the faithful performance by them of their contract.

Fourth. The payments arising out of this contract as provided for, in the seven (7) per cent. bonds of the said railway company and county of Leavenworth, shall be made by said party of the first part to said party of the second part every thirty (30) days *pro rata* as the work progresses, according to the terms of this agreement.

The said party of the first part shall retain twenty (20) per cent. until the work herein contracted to be done is completed and said railway is finished and equipped, when full and final payments shall be made by said party of the first part to said party of the second part.

In witness whereof the parties hereto of the second part have affixed their hands and seals, and the party of the first — hath caused its

corporate seal to be hereto affixed, and this instrument to be
213 signed by its president, the day and year first above mentioned.
[Stamp.]

R. M. SHOEMAKER. [L. S.]
GILES F. FILLEY. [L. S.]
C. S. GREELEY. [L. S.]
JAMES ARCHER. [L. S.]
JOSEPH C. BUTLER. [L. S.]
S. M. EDGELL. [SEAL.]
[SEAL] JOHN D. PERRY, *Pres't.*
Attest: JNO. P. DEVEREUX, *Sec'y.*

Endorsed: "No. 2." No. 3437. Contract with R. M. Shoemaker & others to build Leavenworth branch. Filed June 8, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy.

214 Copy.

An agreement made and concluded this first day of October, A. D. 1866, between the Union Pacific Railway Company, Eastern Division, of the first part, and Carlos S. Greeley, Robert E. Carr, Wm. M. McPherson, Stephen M. Edgell, Robert M. Shoemaker, Edward Miller, Mathew Baird, and Joseph N. Kinney, parties of the second part, contractors carrying on the business of this contract under the firm name of Shoemaker, Miller & Co., witnesseth:

That for and in consideration of the covenants and stipulations hereinafter contained, to be performed by the party of the first part, the parties of the second part hereby agree to furnish all the materials, equipments, iron, rails, chairs, spikes, sleepers, timber, bridges, masonry, rolling-stock, poles, wire, and other material needed, and to build, construct, and equip for the parties of the first part a first-class railroad and telegraph line from the present western terminus of said Union Pacific railway, Eastern Division, on the Government reserve at Fort Riley and west from the Missouri river, — miles, to such point on the waters of the Smoky Hill river as said railroad is subsidized in bonds by the acts of Congress of July, 1862, and the several acts amendatory and supplemental thereto, said point or distance supposed to be 250 miles, the equipment for said road to be as follows:

For each and every thirty (30) miles two (2) first-class engines, one (1) first-class passenger car, fifteen (15) box cars, ten (10) platform cars; one (1) baggage car to every forty (40) miles, and the necessary hand cars, with all necessary engine-houses, shops, tools, machinery, [and] shafting, complete for maintaining an ample equipment to operate the road; the said railway and telegraph line to be constructed under this contract to be located along the route on the waters of the Smoky Hill which has already been indicated by a preliminary survey of the engineer of the party of the first part, but subject to such changes upon
215 actual survey as the road progresses as the said party of the first part shall deem it necessary to make, reference being had to the maps, plans, and profiles of the company to be found in the

office of their engineers, all of the said railway and telegraph line to be fully completed and equipped by the 31st day of December, 1867, in the manner herein provided, and fully to meet the requirements of the several acts of Congress hereinbefore mentioned, so as to make the same in all respects a first-class railroad and telegraph line. In consideration of the construction and equipment of the said railroad and telegraph as herein provided for, and the performance of the undertakings hereinafter mentioned, the party of the first part agrees to pay to the parties of the second part the following bonds, stock, and lands, to wit: All the bonds from the Government of the United States when received, said bonds being issued in pursuance of the acts of Congress of July, 1862, and the acts amendatory thereof and supplemental thereto, said bonds being at the rate of $16,000 per mile; all the first-mortgage bonds of said party of the first part issued under a first mortgage of said party, beginning at and from the 140 mile post of its railway west from its initial point on the Missouri river, at the State line between said State of Missouri and the State of Kansas, and extending to the terminus of the railroad and telegraph to be constructed under this contract, said first-mortgage bonds to be issued at the rate of $16,000 per mile and no more on the said line of railroad and telegraph line westward from said 140th mile post, and may be issued in advance to the extent of 100 miles of a continued completed line of said railway company, as provided for by act of Congress, said bonds are dated June 1st, 1866, payable in thirty years in the city of New York, with interest
216 warrants attached payable semi-annually at the same place in the gold coin of the United States of America; ten thousand dollars per mile in the income bonds of the company for each and every mile of railroad and telegraph line built under this contract, and which said income bonds are secured by a certain deed of trust from the said party of the first part to Carlos S. Greeley and Adolphus Meier, trustees, dated the first day of July, 1866; and of the full-paid capital stock of the party of the first part $8,000 per mile for each and every mile of railway and telegraph line built under this contract; and, in addition thereto, the party of the first part shall pay to the party of the second part $400,000 of the income bonds and $600,000 of the stock of said Union Pacific Railway Company, Eastern Division, as the said parties of the second part shall pay the debts of the company hereinafter mentioned.

And it is further agreed between the parties hereto and as a part of the consideration to the said parties of the second part for the performance of their undertakings herein mentioned that whatever lands the said party of the first part may have the right to acquire by purchase from the United States Government under the treaty with the Pottawatomie nation of Indians of date the 15th November, 1861, such rights of purchase and all other rights incident thereto may and shall enure to the use and benefit of the parties of the second part to this contract by their paying the purchase-money for said lands and interest required by said treaty, and by assuming and discharging all obligations imposed on said party of the first part to acquire said lands by the provisions of the same; and the

said party of the first part covenants and agrees with the said party of the second part to accept the terms and provisions of said treaty; in accordance therewith to contract for the purchase
217 of said lands, and upon the request of the party of the second part to assign said contracts of purchase to them with the request that patents be made directly to said parties of the second part, or their assigns, and if the title to said lands shall be by the United States vested in the party of the first part, then to convey said lands by good and sufficient title to the parties of the second part, or their assigns, in accordance with the terms of this agreement.

It is further understood and agreed that the first-mortgage bonds aforesaid are to be delivered to the parties of the second part as the necessities of the said parties of the second part may require to enable them to perform this contract, but not in advance of 100 miles of a continued completed line of railroad of said party of the first part, and the said income bonds at the rate of $10,000 per mile and full-paid stock at the rate of $8,000 per mile shall be delivered as the said railroad and telegraph line shall be from time to time accepted by the Government and turned over to said parties of the first part by said parties of the second part, as hereinafter provided, all of the said bonds and stock to be delivered as herein provided to said parties of the second part, or their assigns, and any title to the said Pottawatomie lands passing to the said railway company the said parties of the second part or their assigns are to be invested with when all their agreements with reference thereto shall be fully performed, such conveyance to be made and all other expenditures in and about said lands at the proper cost and charges of said parties of the second part.

It is further understood and agreed that as each and every division of the railroad and telegraph line to be constructed under this contract is completed and accepted by the United States Government it shall be, with its equipment, turned over to the said party of the first part, the party of the second part performing
218 any work thereafter which the United States commissioners may require to be done on the same and subject to the approval of the board, and all the work to be done under this contract shall be performed and all the equipments and materials supplied to the satisfaction of the Government commissioners and of the board of directors of said Union Pacific Railway Company, Eastern Division; and it is agreed and understood that all the railroad and telegraph line herein provided to be built shall conform in every respect to the profiles, maps, drawings, and specifications of the said railway company; and if, in the opinion of the said board of directors of the party of the first part, the parties of the second part shall neglect or refuse to prosecute the work herein undertaken to be done and performed in such manner as to give reasonable assurance of the complete performance of their contract within the time limited and stipulated, then it shall be lawful for the said party of the first part to declare this contract terminated, and they may enter upon the said premises and prosecute the work to completion at the ex-

pense of the contractors, applying the assets to be paid them to the payment for the work, or an account may be stated, under the direction of an engineer for that purpose, selected by the board of directors, of the value of all work done, material furnished and on hand, in process of manufacture, or in transit, all of which in such event shall be the property of the party of the first part and shall be accounted for at its fair value, to be, with the work done, estimated by the said engineer, whose decisions shall be final and shall be credited to the said party of the second part in the payment for the mortgage, bonds, stocks, and land advanced them, and if a balance shall be found due said parties it shall be paid to them, but if said party shall be found indebted to said party of the first part on account of advances such advances shall be returned in kind, or in default of which said party shall pay the company the par value of said advances in money; and it is
219 further understood and agreed that the said party of the first part shall at all times upon request transport over their road, and to the exclusion of all other business except Government business, all the rails, ties, spikes, bridges, materials, and other supplies of said parties of the second part to aid them in the completion of this contract within the time provided; and it is further agreed, subject to the provisions hereof, that all the iron, spikes, chairs, cars, locomotives, and rolling-stock of every description, and all other materials to be furnished by said parties of the second part under this contract, are when purchased and wherever situate the property of said parties of the second part and at their risk, and shall not become under this contract the property of the railroad company until after the several divisions of the road for which said equipment and material was provided are accepted respectively by the Government and turned over to the company, as herein provided; and for the transportation to be done as aforesaid for the parties of the second part by the party of the first part they are to charge a rate not to exceed two (2) cents per ton per mile for rails, chairs, ties, bridges, and other articles required for the construction of the road for each and every mile transported over the road, whether or not any portion of said road shall have been turned over at the time to the company by the contractors, and no charge shall be made by said railway company for the original transportation of any locomotives or rolling-stock going out to said contractors to such point on said road as may be required by the contractors.

It is further understood and agreed that in the event of the death of either or any of the parties of the second part this contract shall not thereby be terminated, but the surviving parties shall proceed to the completion of this contract without interference on the part of the personal representatives of the deceased party or par-
220 ties, and in such case the party of the first part shall not be liable to account to or unto the personal representatives of such deceased party until the completion of this contract, and such accounting shall then be had between the party of the first part and the survivors of such deceased, and not unto his personal representatives.

Said party of the first part will transport all the laborers and employees of the contractors free of charge over their road when desired by the contractors, their duly authorized agent, or officers, and the special car of the general manager of contractors shall be transported free.

Said party of the first part will also transfer to the contractors all right to take timber, wood, &c., to be obtained or had upon the diminished Delaware reserve from the Missouri River Railroad Company, or its assigns, the contractors paying the stipulated prices therefor.

It is further understood and agreed that the party of the second part shall pay all expenses of rights of way, engineering, and all expenses of this general character, stations, water-tanks, engine-houses, shops, &c., to be furnished at such points as the railroad company may decide.

It is further understood and agreed that if the parties of the second part should be obstructed by the acts of hostile Indians, or if, for any other reasonable cause, a majority of the contractors, parties of the second part, should desire to stop the construction at any point east of the western terminus designated in this contract, then and in either of those events they, upon notice in writing to the company, shall be released from the fulfillment of the balance of said contract, receiving payment only for the actual distance constructed and equipped, work done, and additional material turned over to the company at the *pro rata* rate for road, and such material in securities of the several kinds herein designated.

221 It is further understood and agreed that in further consideration of the payments hereinbefore recited to be paid by the party of the first part the parties of the second part shall pay the unfunded cash debts and obligations of the Union Pacific Railway Company, Eastern Division, existing at the termination of the contracts with Robert M. Shoemaker & Co., estimated at $450,000, but not to exceed $500,000.

In the event of the parties of the second part determining, for any of the reasons hereinbefore stated, to suspend the execution of the work the value of the work done and material provided by said parties, estimating the same at the prices herein stipulated to be paid and according to the value of such price, shall be determined by the engineer of the company appointed or to be appointed for that purpose, and his decision shall be final.

And it is further agreed that the parties of the second part shall and will pay all the accrued interest on said first-mortgage bonds at the time of delivery and the interest to accrue thereon for one year thereafter and to indemnify and save the party of the first part harmless on account of said interest and will provide said party of the first part, at a reasonable time in advance of said interest becoming due, the necessary funds for the payment of the same; in default of which said party may retain any assets of said party of the second part or any security or land to be paid under this contract and apply the same to such payment or hold the same till this part of the agreement is complied with.

In witness whereof the parties of the second part have hereto set their hands and seals and the party of the first part has caused its seal to be hereunto affixed and these presents to be signed by its president and attested by its secretary this first day of October, 1866.

JOHN D. PERRY, *President.*
C. S. GREELEY.
M. BAIRD.
S. M. EDGELL.
222 R. M. SHOEMAKER.
ROB C. CARR.
WM. M. McPHERSON.
I. N. KINNEY.
EDW. MILLER.

Attest: CHAS. B. LAMBORN, *Secretary.*

Contract endorsed: No. 3. No. 3437. Shoemaker, Miller & Co. and U. P. R'y Co., E. D. J. W. Griffith, notary public. Filed June 8, 1882. A. S. Thomas, clerk.

223 Agreement, made this twenty-seventh day of June, 1865, between Robert M. Shoemaker, Edward Miller, Mathew Baird, Joseph C. Butler, Carlos S. Greeley, Giles F. Filley, Stephen M. Edgell, and James Archer, witnesseth: For and in consideration of the several promises and agreements hereinafter contained and agreed to be performed, and of one dollar by each to the other in hand paid, of which the receipt is hereby acknowledged, the parties hereto agree:

Stamp. First. That they will enter into contracts with the Union Pacific Railway Company, Eastern Division, for the completion of its road between Lawrence and Fort Riley and the branch between Leavenworth and Lawrence.

Second. That the death of either of the parties hereto shall not terminate the interest of said party or — represented by him, nor put an end to the said contracts, but the same shall be performed and the work thereby required prosecuted to completion as if no death had occurred.

Third. The personal representatives of a deceased party shall have no power to interrupt the progress of the work, or interfere therewith, or with the execution of the said contracts, or with the conduct, control, and management of the undertaking, but the construction of the said road and the execution of the said contracts shall be prosecuted by the surviving parties hereto and the successor to the deceased (to be appointed hereunder) without any interference on the part of the representatives of said deceased.

Fourth. In case of the death of either of the parties hereto the survivors shall appoint a successor or substitute for him, five at least of said survivors concurring in the said appointment, and

Stamp. such successor shall have all the rights and powers possessed hereunder by the party in whose place he may be substituted.

Fifth. The active management of the work, including the purchases therefor, shall be in the hands of Robert M. Shoemaker,
224 subject, however, to the control of five of the other parties, and in the event of his death a successor shall be appointed in his place by the survivors, the concurrence of five, at least, being necessary to a choice, which successor shall have all the same powers, rights, and privileges possessed by the deceased by virtue hereof.

Sixth. Each of the parties interested shall have such an interest in the said contracts and the profits arising therefrom and shall be responsible for such proportion of any losses or obligations thereon as shall appear by the certificate issued to him, as hereinafter provided.

Seventh. It is agreed that certificates shall be issued by the parties hereto for one-half of the interest hereunder to such persons and in such proportions as Carlos S. Greeley may designate and direct, and [a] like certificate for the remaining half-interest hereunder shall be issued to such persons as Joseph C. Butler may designate and direct, which said certificates shall be executed by the
Stamp. parties hereto, and shall be in the form hereinafter mentioned.

Eighth. The certificate shall be in the following form:

Certificate of Interest in the Contracts of Robert M. Shoemaker and Others with the Union Pacific Railway Company, Eastern Division, dated July First, Eighteen Hundred and Sixty-Five.

Whole number of shares 2,000.

This is to certify that —— —— is entitled to — shares in the net profits or liabilities to accrue from or under two contracts made by Robert M. Shoemaker and others with the Union Pacific Railway Company, Eastern Division, dated, respectively, July first, eighteen hundred and sixty-five.

It is agreed that neither such interest nor this certificate shall entitle the holder to interfere with the execution of the said
225 contracts, nor in the performance of the work thereunder, nor to any control in regard to the conduct and management of the business to be done thereunder, nor to any accounting during the progress of the work or the performance of the contracts, but shall only entitle such party, on the completion of the work, to his share in the net profits of the contracts subject to the provisions hereof; and it is agreed that neither this certificate nor the interest of the holder herein shall be assigned or transferred without the consent of all the parties signing this certificate or the con-
Stamp. sent of their survivors and successors. The holder hereof by accepting the same and in consideration thereof assumes to bear his proportion of all losses which may arise under or in pursuance of said contracts, and this certificate is taken subject to all the provisions and stipulations of the agreement between said Shoemaker and his associates, in pursuance of which this certificate is issued.

Ninth. All the certificates of stock received under the said construction contracts shall be assigned and transferred to J. Edgar Thomson and John D. Perry, as trustees, to be held by them until the completion or other sooner termination of the two construction contracts between Robert M. Shoemaker and others and the said company, and while so held shall be voted upon by them at all elections and meetings of the company. Four of the directors of said railway company shall be nominated by Carlos S. Greeley, Giles F. Filley, Stephen M. Edgell, James Archer, and their successors, and four others of the directors shall be nominated by Edward Miller, Robert M. Shoemaker, Mathew Baird, and Joseph C. Butler, and their successors, and the ninth one of the directors shall be nominated by the said Thomson and Perry, and in case they cannot agree the said ninth director shall be selected by said Thomson; the nine so selected shall be voted for by the said Thomson
226 and Perry jointly. Upon the completion or other sooner termination of the said contracts the said stock is to be transferred by the said Thomson and Perry, trustees, to the parties hereto or their successors for distribution under this contract.

Tenth. No party to this contract or interested in it shall acquire to his personal interest or advantage any real estate in Kansas within two miles of the route of said railway, and all property purchased since January first, eighteen hundred and sixty-five, or that shall hereafter be purchased within said limit shall at the election of a majority of the parties hereto and the successors of such of them as may be changed operate and enure to the common benefit of this adventure, and the party so acquiring shall convey the same to such person or persons as shall be appointed by the parties hereto and the successors of such as may be changed on the reimbursement of cost and interests.

R. M. SHOEMAKER. [SEAL.]
JOSEPH C. BUTLER. [SEAL.]
C. S. GREELEY. [SEAL.]
GILES F. FILLEY. [SEAL.]
JAMES ARCHER. [SEAL.]
S. M. EDGELL. [SEAL.]

Endorsed: "No. 4." No. 3437. Filed June 8, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy.

227 Whereas Carlos S. Greeley, Robert E. Carr, Stephen M. Edgell, and others subscribed hereto as parties in interest in contract of Shoemaker, Miller & Co. with the Union Pacific Railway Company, Eastern Division, to construct and equip its railway from Fort Riley west so far as the subsidy in Government bonds in aid of such construction extends, for which said constructors are to receive certain of the bonds, capital stock, and lands of the company; and the said Carlos S. Greeley, Robert E. Carr, and Stephen M. Edgell, subscribers hereto, and the undersigned have associated themselves together in the performance of their part of the above contract, and they, with the undersigned, who embrace all the members of this said association, agree with each others as follows, viz:

That the bonds, stock, and lands to be received by the said Carlos S. Greeley, Robert E. Carr, and Stephen M. Edgell, and other subscribers hereto which come to their interest, stock and land to be paid by the company for performance of said contract, are to be equally shared between the associates in person *pro rata* to their interest.

And they further agree that they will provide all necessary funds to enable said contractors on their part to execute the said contract, and they estimate the sum necessary to be immediately provided for that purpose at twelve hundred thousand dollars, and the interest of the parties severally in said contract is agreed to be one-half part of the proceeds to be derived from the railway company for the performance of the work, and for the purpose of raising the necessary funds to prosecute the work it is agreed that the said Carlos S. Greeley, Robert E. Carr, and Stephen M. Edgell shall be the executive committee of the undersigned, and they are hereby authorized to negotiate a loan or loans, if practicable, for one year or longer to the amount of six hundred thousand dollars, and each member of the association agrees hereby to give his name to a joint or a joint and several promissory note, or to become the
228 drawer, acceptor, or endorser, as required by the committee, to the extent of six hundred thousand dollars, or upon contingency, as hereinafter provided, twelve hundred thousand dollars, to enable said committee to effect a loan or loans to that amount. Each associate shall be equally bound for the protection and payment of the paper made for such loan or loans, without regard to their names being on the notes or bills, or to the character in which they may have executed such paper. The committee shall require the twelve associates to furnish their names as loans are necessary to be made in as nearly equal proportions as may be practicable. The remaining six hundred thousand dollars shall be raised by said committee in the manner as above provided, or as they may in their discretion think best for the interest of the parties, provided that if any one or more of the undersigned shall so elect, and shall pay his *pro rata* of said amount as it shall be required by said executive committee, the further loan, if any, shall not be made upon his credit, and any party so paying shall be entitled to withdraw from the committee his proportion of said first-mortgage bonds a,t the rate of sixty cents to the dollar of the bond for the money by him paid as aforesaid. If a further sum is required than above provided to enable said contractors to perform the contract on their part, then the undersigned agree to advance their *pro rata* proportion of any assessment that may be made for that purpose. All of the securities to be received for the performance of said contract by the above-named committee shall be retained and held by said committee, except as above provided, till the complete performance of the contract and the discharge of all liabilities of the association, when the same shall be distributed to the parties respectively entitled in proportion to the amounts by them respectively paid. But no final distribution shall be made till all the liabilities of the association

shall be discharged, and all shall be held by the committee
229 as an indemnity for paying the same, to be applied thereto at such rate and in such manner as the committee in its discretion shall determine to be for the best interest of the association.

If, during the progress of the execution of said contract and paying the sums borrowed, any party hereto shall make default of any duty or obligation imposed on him by this agreement for ninety days, the interest of said party in this association may be declared absolutely forfeited to the association by the voice of two-thirds of the members of the association and all his obligations to the association shall cease, and he, by these presents, doth release said association and the committee from all obligation to account to him on account of any interest he may have had in the association.

If any associate shall die or become incapable from mental infirmity from performing any duty or obligation by these presents undertaken by him, his interest in this contract created by any payment made by him or upon his credit shall not thereby be forfeit-, but shall remain, and, upon the payment of the due proportion by him to be paid by his legal representative or other person in manner and time as required by the committee, his proper dividend shall be made to him or his representative upon all his interest, but a noncompliance with this requirement shall subject such unpaid interest to forfeiture.

Any vacancy occurring in the executive committee shall be supplied at a regular meeting of the associates from one of their number by a vote of a majority of those present, and regular meetings shall be held on the first Tuesday of each month, at which meetings reports of the committee shall be made.

A reasonable compensation shall be paid the committee for their services from the funds of the association.

If payments are made by the associates and first-mortgage
230 bonds are withdrawn as herein provided, an account shall be made of the accrued interest thereon and be paid by the party withdrawing such bonds.

JOHN D. PERRY.
ROB. E. CARR.
S. M. EDGELL.
GILES F. FILLEY.
ADOLPHUS MEIER.
WM. M. McPHERSON. $100,000.
B. W. LEWIS, JR.
C. S. GREELEY. $75,000.
JAS. B. EADS.
THOS. L. PRICE.
JAMES ARCHER.

Endorsed; No. 5. St. Louis, —, 1866. John D. Perry, C. S. Greeley, R. E. Carr, S. M. Edgell, & others. Agreement No. 3437. Filed June 8, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy.

231 Agreement, made this 15th day of September, 1866, between Robert M. Shoemaker, Edward Miller, Mathew Baird, Joseph N. Kinney, Carlos S. Greeley, Wm. M. McPherson, Stephen Edgell, and Robert E. Carr, witnesseth: For and in consideration of the several promises and agreements hereinafter contained and agreed to be performed, and of one dollar by each to the other in hand paid, of which the receipt is hereby acknowledged, the parties hereto agree:

First. That they will enter into a contract under the firm title of Shoemaker, Miller & Co. with the Union Pacific Railway Company, Eastern Division, for the completion of its road between Fort Riley and the point west of the 100th meridian to which the Government subsidy in bonds extends.

Second. That the death of either of the parties hereto shall not terminate the interest of said party or the party or parties represented by him, nor put an end to the said contract, but the same shall be performed and the work thereby required prosecuted to completion as if no death had occurred.

Third. The personal representatives of a deceased party shall have no power to interrupt the progress of the work or interfere therewith, or with the execution of the said contract, or with the conduct, control, and management of the undertaking, but the construction of the said road and the execution of the said contract shall be prosecuted by the surviving parties hereto and the successors of the deceased (to be appointed hereunder) without any interference on the part of the representatives of said deceased.

Fourth. In case of the death of either of the parties hereto the survivors shall appoint a successor or substitute for him, five at least of said survivors concurring in the said appointment, and such successors shall have all the rights and powers possessed here-
232 under by the party in whose place he may be substituted.

Fifth. The active management of the work of construction and engineering shall for the time being be in the hands of Robert M. Shoemaker, but he or his successor or successors shall be subject to removal at the will of any five of the other parties, and in the event of the death, disability, or removal of the manager his successor or successors shall be appointed by the survivors, the concurrence of five being necessary to a choice. Such successor or successors shall have all the powers and privileges possessed by his predecessor by virtue hereof.

Sixth. Each of the parties interested with us shall have such an interest in the said contract and the profits arising therefrom and shall be responsible for such proportion of any losses or obligations thereon as shall appear by the certificate issued to him, as hereinafter provided.

Seventh. It is agreed that certificates shall be issued by the parties hereto to the parties who may subscribe to the agreement to advance money to aid in carrying out the said contract of construction. The parties hereto shall execute the same under the firm name of Shoemaker, Miller & Co., and they shall be in form, tenor, and effect as stated in said agreement, and the party to whom such certificate

may be issued shall be entitled to all the benefits and privileges and subject to all the liabilities and forfeitures prescribed in said certificate.

Eighth. No party to this contract or interested in it shall acquire, to his personal interest or advantage, any real estate in Kansas west of Fort Riley within two miles of the route of said railway, and all property purchased since September 1st, 1866, or that shall hereafter be purchased within said limit, shall, at the election of a majority of the parties hereto and the successors of such of them as may be changed, operate and enure to the common benefit of this ad-
233 venture, and the party so acquiring shall convey the same to such person or persons as shall be appointed by the parties hereto and the successors of such as may be changed on the reimbursement of costs and interest.

In witness whereof we have set our hands and seals this fifteenth day of September, A. D. 1866, at the city of St. Louis.

EDW. MILLER.
M. BAIRD.
J. N. KINNEY.
C. S. GREELEY.
WM. M. McPHERSON.
S. M. EDGELL.
ROB. E. CARR.
R. M. SHOEMAKER.

In presence of—
CHAS. B. LAMBORN.

The words "the party or parties," in line 21, page 1, interlined previous to signature.

Endorsed: No. 6. No. 3437. Filed June 8, 1882. A. S. Thomas clerk, by Geo. N. Holmes, deputy.

234 *Certificate of Interest in the Contracts of Robert M. Shoemaker and others with the Union Pacific Railway Company, Eastern Division, dated July first, Eighteen Hundred & Sixty-Five.*

Whole number of shares, 2,000.

This is to certify that —— —— is entitled to — shares in the net profits or liabilities to accrue from or under two contracts made by Robert M. Shoemaker and others with the Union Pacific Railway Company, Eastern Division, dated respectively July first, eighteen hundred & sixty-five.

It is agreed that neither such interest nor this certificate shall entitle the holder to interfere with the execution of the said contracts, nor in the performance of the work thereunder, nor to any control in regard to the conduct and management of the business to be done thereunder, nor to any accounting during the progress of the work or the performance of the contracts, but shall only entitle such party, on the completion of the work, to his share in the net profits of the contracts subject to the provisions hereof; and it is agreed that neither this certificate nor the interest of the holder herein

shall be assigned or transferred without the consent of all the parties signing this certificate or the consent of their survivors and successors. The holder hereof, by accepting the same, and in consideration thereof, assumes to bear his proportion of all losses which may arise under or in pursuance of said contracts, and this certificate is taken subject to all the provisions and stipulations of the agreement between said Shoemaker and his associates in pursuance of which this certificate is issued.

Endorsed: No. 7. No. 3437. Filed June 8, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy.

235 ST. LOUIS, *November 14th*, '66.

It is hereby agreed by and between the parties associated in the contract of Shoemaker, Miller & Co., for the construction of the Union Pacific R. W., E. D., west of Fort Riley, that the agreement between the associates, dated October 1st, 1866, shall be altered so as to provide that first-mortgage bonds shall be issued to the subscribers at par for the amount of each installment as paid, and that the residue of the 1st-mortgage bonds, income bonds, capital stock, and Pottawatomie lands paid and to be paid the contractors may not be issued until the completion of the contract. C. S. Greeley, 75,000; John D. Perry, 100,000; D. B. Gale, 10,000; Adolphus Meier, 100,000; James Archer, 92,000; Jno. P. Collier, 10,000; Adolphus Meier, 9,000; G. F. Filley, 75,000; B. W. Lewis, Jr., 75,000; John C. Rust, by A. Meier, 9,000; Rob. E. Carr, 95,000; Jas. B. Eads, 100,000; O. D. Filley, 80,000; James F. Comstock, by C. S. Greeley, 25,000; S. M. Edgell, 50,000; Geo. D. Hall, 30,000; Wm. M. McPherson, 100,000; S. T. Glover, 10,000; Edw. J. Mitchell, 7,000; Barton Bates, 80,000; Samuel R. Filley, by G. F. Filley, 20,000; John R. Shepley, 10,000; Joseph O'Neill, 10,000; Thos. L. Price, by John D. Perry, 100,000; Henry Martin, by S. M. Edgell, 100,000; A. C. Anderson, 10,000; J. P. Usher, 100,000.

236 Endorsed: No. 8. No. 3437. Filed June 8, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy.

237 *Income Bonds, S. M. & Co.*

Names.	$1,000 bonds.	$250.	$100.	Total am't.
Enoch Pratt	1958–1967	701–702	701–702	$10,700 00
Thos. Wilson	1968–1977	703–704	703–704	10,700 00
S. Gebhart'	1978–1987	705–706	705–706	10,700 00
V. Winters & Son	1988–2003			16,000 00
C. H. Kilgour	2020–2023	787–790	760–784	7,500 00
R. M. Shoemaker	2024–2100		801–830 & 711	80,100 00
Seth Evans	2101–2137		707–710	37,400 00
J. N. Kinney	2138–2166	707–708	713–715	29,800 00
B. F. Strader	2167–2175	709–727	716–724	14,900 60
W. H. Clement	2176–2185	771–786	751–759	14,900 00
Lary Anderson	2186–2195	791–794	831–869	14,900
P. Andrew	2196–2200 2259–2262	795–800	785–800 870–897 & 712	15,000
Clason & Morse	2201–2235	729–736	730–733	37,400
L. A. Green & Co	2236–2242		725–729	7,500
Alfred Gaither	2243–2247	737–744	734–738	7,500
G. Y. Roots	2248–2252	745–752	739–743	7,500
Bartlit & Smith	2253–2258	753–770	744–750	11,200
S. M. Edgell	2356–2407	811–814	904–907	53,400
B. W. Lewis, Jr	2408–2484	815–822	908–918	80,100
Thos. L. Price	2485–2588	823–832	919–921	106,800
Adolph Meier	2589–2694	833–834	922–924	106,800
Wm. M. McPherson	2695–2798	1062 835–844		106,750
Jas. B. Eads	2799–2902	1070 845–854		105,750
Henry Martin	2903–3006	1061 855–864		106,750
Giles F. Filley	3007–3083	865–876	934	80,100
John D. Perry	3084–3112	877–888		32,000
H. W. Wissman	3113–3121	889–894	935–936	10,700
A. C. Erfort	3122–3130	895–900	937–938	10,700
F. W. Meiester	3131–3139	901–906	939–940	10,700
A. D. Filley	3140–3196	907–916	941–942	58,700
S. R. Filley	3197–3215	917–924	943–946	21,400
John D. Lock	3216–3239	925–932	947–953	26,700
E. & T. Fairbanks & Co	3240–3289	934–944	954–957	53,150
A. Meier, trustee	3290–3297	945–950	958	9,600
J. C. Rust	3298–3305	951–956	959	9,600
C. S. Greeley	3313–3381		967–970	69,400
R. E. Carr	3382–3482		971–974	101,400
James Archer	3483–3567	969–978		87,500
J. R. Shepley	3568–3575	979–988	975–976	10,700
Barton Bates	3576–3658	989–996	977–980	85,400
A. C. Anderson	3659–3667	997–1002	981–982	10,700
D. B. Gale	3668–3676	1003–1008	983–984	10,700
J. P. Collier	3677–3684	1009–1018	985–986	10,700
G. D. Hall	3685–3714	1019–1026		32,000
J. F. Comstock	3715–3739	1027–1032	987–988	26,700
Jos. O'Neil	3740–3747	1033–1042	989–990	10,700
E. J. Mitchell	3748–3752	1043–1052		7,500
Charles Enslin	3804–3808		995–997	5,300
238 C. B. Burnham	3809–3813		998–1000	5,300
S. T. Glover	3814–3823	1063–1064	1001	10,600
J. P. Usher	3753–3803	1053–1060		53,000
T. J. Bartholow	2315–2355	805–810	902–903	42,700
J. W. & W. J. Lewis	2263–2314	801–804	898–901	53,400
Barney & Smith	2004–2019			16,000

Endorsed: No. 9. No. 3437. Filed June 8, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy.

239 We, the undersigned, hereby subscribe to an association, under the title of Shoemaker, Miller & Co., to contract for building the Union Pacific railway, Eastern Division, from Fort Riley westward, on the terms of a contract of which a certified copy is appended to this subscription paper, the whole number of shares to be twenty-eight hundred (2,800) of $1,000 each.

Name.	Address.	No. of shares.
John D. Perry	St. Louis	100
Thos. L. Price	Jefferson City, Mo.	100
Adolphus Meier	St. Louis	100
Wm. M. McPherson	St. Louis	100
O. D. Filley	"	100
James Archer	"	100
B. W. Lewis, Jr.	"	100
S. M. Edgell	"	50
E. & T. Fairbanks & Co.	St. Johnsbury, Vt.	50
Giles F. Filley	St. Louis	100
Rob't E. Carr	St. Louis	100
James B. Eades	"	100
C. S. Greeley	"	100
J. P. Usher, for self, Peck & Griswold	Terre Haute	100
Edward Miller	Phil'a	100
Seyfert, McManns & Co., per T. A. Scott, att'y	"	100
M. W. Baldwin & Co., per T. A. Scott, att'y	"	120
J. Edgar Thomson, per T. A. Scott, att'y	"	100
240 Thos. A. Scott, trustee	Phila.	20
Thos. A. Scott, trustee	"	10
Thos. A. Scott, trustee	"	10
Thos. A. Scott, trustee	"	10
I. B. Anderson	"	100
Thos. A. Biddle	"	50
H. H. Houston	"	100
Andrew Carnegie	Pittsburg	100
I. N. Kinney	Cincinnati	28
R. M. Shoemaker	Glendale	75
J. W. Kirk, att'y, per J. H. Cheever	Cincinnati	10
V. Winters & Son.	Dayton, Ohio	15
Simon Gebhart	Dayton, Ohio	10
Barney & Smith	Dayton, Ohio	15
G. Y. Root	Cin.	7
A. L. Mowry, by L. A. Green	Cincinnati	7
L. Anderson	"	14
B. F. Strader	"	14
Seth Evans	"	35
Clason & Morse	"	35

Name.	Address.	No. of shares.
W. H. Clement, att'y	Cincinnati	91
C. H. Kilgorn, trustee	"	7
P. Andrews	"	14
Albert Shuther	"	7
Edward I. Mitchell, per N. V. Carson	St. Louis	7

OFFICE OF UNION PACIFIC R. W. CO., E. D.,
ST. LOUIS, *Sept.* 17, 1866.

I hereby certify that this is a correct copy of the subscription paper of Shoemaker, Miller & Co., in my possession, and of
241 the signatures and amounts attached thereto.

WM. I. PALMER,
Treasurer.

Endorsed: No. 10. No. 3437. Filed June 8, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy.

242 *Parties in Interest in the Firm of R. M. Shoemaker & Co.*

Western parties.

Name.	Subscription.
John D. Perry	217,000
C. S. Greeley	100,000
G. F. Filley	117,000
T. L. Price	97,000
S. M. Edgell	72,000
A. Meier	67,000
J. P. Usher	20,000
James Archer	50,000
Henry Martin	50,000
George Partridge	25,000
O. D. Filley	25,000
J. D. Locke	25,000
H. Holton	25,000
R. E. Carr	20,000
Glover & Shepley	20,000
George D. Hall	15,000
R. C. Anderson	10,000
D. B. Gale	10,000
Jas. Smith	10,000
G. C. Swallow	10,000
D. R. Garrison	5,000
H. C. Crevling	5,000
Wm. Myers	5,000
	1,000,000

243 Eastern parties.

Name.	Subscription.
J. E. Thomson	100,000
Seyfert, McManns & Co.	100,000
J. B. Anderson	80,000
M. W. Baldwin & Co.	120,000
Thos. A. Biddle	25,000
Thos. S. Clarke	25,000
William Tharr	25,000
H. H. Houston	25,000
Wm. F. Luch	25,000
Edward Miller	20,000
R. H. Lamborn	5,000
F. H. Jackson	5,000
Wm. J. Palmer	5,000
R. M. Shoemaker	91,000
T. L. Jewett	43,750
Alfred Gaither	30,000
H. J. Jewett	25,000
J. N. Kinney	20,000
Thos. Sherlock	10,000
Wm. Dennison	10,000
Wm. H. Clement	10,000
A. H. Barney	10,000
Andrew Gross	10,000
L. Davinney	10,000
J. W. Kirk	10,000
Larz Anderson	10,000
Forward	849,750

244 Amount bro't forward 849,750

P. W. Strader	10,000
J. M. Davison	10,000
Theo. Cook	10,000
J. Harshman	10,000
Simon Gebhart	10,000
V. Winter & Son	10,000
B. L. & W. C. Brown	10,000
E. W. Woodward	5,000
B. E. Smith	5,000
J. H. Rhodes	5,000
A. H. Lewis	5,000
S. R. Swan	5,000
D. S. Grey and Jas. Means	5,000
W. A. Goodman	5,000
G. H. Pendleton	5,000
A. L. Mowry	5,000
C. H. Kilgour	5,000
G. W. McCook	6,250
H. Bancroft	3,000

Eastern parties—Continued.

Name.	Subscription.
S. Medbury	3,000
W. Failing	1,000
Chas. R. Capilly	5,000
Ashbell Green	10,000
F. Lough	2,000
	1,000,000

Account list.
St. Louis, Feb. 6, 1867.

CHAS. B. LAMBORN, *Secr'y.*

[Endorsed:] No. 11. No. 3437. Filed June 8, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy.

245 Whereas the Union Pacific Railway Company, E. D., is indebted to John D. Perry and the other subscribers hereto for moneys advanced and expended for and on account of the said company in the sum of one million one hundred & eighteen thousand seven hundred and twenty-eight dollars & seventy-one cents, including interest to the first day of July, 1865, and certain parties have, by an agreement dated even date herewith, agreed to pay unto the said Union Pacific Railway Company, Eastern Division, the sum of one million ($1,000,000) of dollars for bonds and stocks of the said company, as by said agreement will appear:

Now the subscribers hereto agree that they will receive and take in payment of eight hundred and ninety-six thousand dollars ($896,000) of the said debt bonds of the said company of the denomination of $1,000 each (to be issued under and in conformity with the provisions of the acts of Congress of July, 1862, and the several acts supplementary thereto and amendatory thereof, bearing interest at the rate of six per cent. per annum, payable in coin) at the rate of eighty cents (80c.) on the dollar, the said bonds to be secured by mortgage upon the first one hundred & forty miles of road and appurtenances of the said Union Pacific Railway Company, E. D., not including the Leavenworth branch, which shall, as soon as possible, be made a first lien upon the same, the amount of the said first lien to be two million two hundred and forty thousand dollars and no more; and that one hundred and four thousand ($104,000) dollars—

(Inserted here *is* fifteen five-cent internal revenue stamps.)

of their said indebtedness shall be applied to the purchase of two thousand and eighty (2,080) of the four thousand one hundred and sixty (4,160) full-paid shares of stock of said company, to be transferred to J. Edgar Thomson and John D. Perry, trustees; and that they will, in payment of the residue of said indebtedness of
246 said company, receive the obligations of said company with interest at eight (8) per cent., payable on or before 1st February, 1866, with the understanding that if the said company shall demand a renewal thereof and shall pay the interest the same shall

be renewed for such further period, not exceeding six (6) months, as the said company shall require.

And the said Union Pacific Railway Company, E. D., hereby agrees to issue its bonds and obligations as above specified.

W. J. SICKLES.
THOS. L. PRICE.
JOHN D. PERRY.
C. S. GREELEY.
ADOLPHUS MEIER.
S. M. EDGELL.
JAMES ARCHER.
GILES F. FILLEY.
O. D. FILLEY,
By G. F. FILLEY.
JOHN D. LOCK,
By G. F. FILLEY.
HENRY MARTIN,
By S. M. EDGELL & C. S. GREELEY.
H. C. CLEVELING.
H. HOLTON.

Endorsed: No. 12. No. 3437. Filed June 8, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy.

247 For and in consideration of one dollar, paid by the Union Pacific Railway Company, Eastern Division, to us, of which the receipt is acknowledged, we hereby relinquish and transfer and release to the said company all right, title, and interest which we or either of us have to or in the several shares of the stock of the said company purchased by us at a sale on the 3rd and 4th days of July, 1865, by the said company of certain shares of its stock for non-payment of assessments made thereon, and authorize the said company to dispose of and appropriate the said stock in the same manner as if the same had been purchased at said sale by the said company, the said company holding us harmless from all liability arising from such purchase or upon such stock.

ADOLPHUS MEIER.
J. P. USHER.
R. M. SHOEMAKER.
W. H. CLEMENT.
H. I. JEWETT.
THOMAS A. SCOTT.
J. EDGAR THOMSON,
By his att'y, THOMAS A. SCOTT.
EDWARD MILLER,
By his att'y, THOMAS A. SCOTT.
THOS. L. JEWETT,
By —— ——. [Illegible.]
C. S. GREELEY.
GILES I. FILLEY.
JAMES ARCHER.
JOHN P. DEVEREUX.
A. C. ANDERSON.

Endorsed: No. 13. No. 3437. Filed June 8, 1882. A. S. Thomas, clerk, by Geo. N. Holmes, deputy.

248 *Suit Brought in State Court to Foreclose a Mortgage Upon a Portion of the Railroad and Property of the Kansas Pacific Railroad.*

BENJAMIN W. LEWIS *vs.* ADOLPHUS MEIER *et al.*

Answer in the State court alleging fraud in the execution of the mortgage and the bonds secured, averring that the president and directors who gave the mortgage were interested in the bonds secured and were to and did receive a share of the proceeds.

The answer contained a prayer for affirmative relief, but had few of the elements of a cross-bill, according to the equity practice of this court. Plaintiff moved the State court for leave to dismiss his suit, which was granted, but the court held that the answer of the railroad company was a good counter-claim under the State practice, and that upon the allegations thereon it was entitled to a hearing.

At this stage of the proceeding the cause was removed to this court by plaintiff, who now moves this court to dismiss the entire suit, including the alleged cross-claim.

The grounds of the motion are:

1. That the litigation is enjoined by the decree of this court in Stewart *vs.* The K. P. Railway Co., Benj. W. Lewis, *et al.*, which decree provides as follows:

There is nothing in the decree to enjoin the railway Co. from contesting the validity of the mortgage, especially in this court; *per contra* it is expressly authorized to do so by the last clause.

And as complainant dismissed his suit in the State court, there remains only the cross-action of the railway Co. to be considered.

2. Upon the ground that the railway Co. has not filed a cross-bill this would be perfectly good if the proceeding had been from the beginning in this court.

249 But while it was pending in the State court the parties were at liberty to proceed according to the State practice, and if this answer in its present form, according to that practice, answered the purposes of a cross-bill, it may be recast here and made to conform to our rules. The fact that their pleading in equity in a State court *are* fatally defective under these rules will not defeat the parties' right if he is willing, after the case comes here, to replead and conform to our rules, the State court having held the answer good as cross-claim upon which affirmative relief could have been granted them. We consider that point adjudicated.

3. It is said that the matters set up in the answer were adjudicated in the Stewart case. If so, the fact must be pleaded in bar.

4. It is also said that the relief asked cannot be granted because the bonds are in the hands of innocent purchasers. This does not appear from the record. It is matter of defense.

Motion overruled.

Endorsed: No. 3437. B.W. Lewis *vs.* Adolphus Meier *et al.* Opinion. Filed June 8, 1882. A. S. Thomas, clerk.

250 June Term, 1882.

THURSDAY, *June* 8, 1882.

BENJAMIN W. LEWIS
vs.
ADOLPHUS MEIER *et al.* } 3437.

This suit *sub*mitted complainant to file brief by July 15, 1882; respondents to answer in thirty days thereafter, and complainant to reply in ten days thereafter.

251 In the Circuit Court of the United States for the District of Kansas.

B. W. LEWIS, JR.,
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, and THE KANSAS PACIFIC RAILWAY COMPANY.

I, James M. Ham, of the city of Brooklyn, being duly sworn, on oath do state that I am the assistant secretary of the Union Pacific Railway Company, which company, by consolidation effected on or about January 24th, 1880, is the successor by consolidation of the Kansas Pacific Railway Company; that as such officer I have possession of the official books and records of the Kansas Pacific Railway Company; that the following is a true and correct statement of the officers and directors of said company, as shown by its official records, commencing from the year 1876 to January 24th, 1880:

Lawrence, Kan., May 4th, 1876, following directors elected: Robert E. Carr, John D. Perry, Adolphus Meier, Carlos S. Greeley, Joseph O'Neill, B W. Lewis, Jr., S. M. Edgell, Jay Gould, Sidney Dillon, Oliver Ames, James D. Smith.

St. Louis, July 1st, 1876, following officers elected: Adolphus Meier, president; D. M. Edgerton, secretary.

St. Louis, Mo., July 6th, 1876, Robert E. Carr offered his resignation as director; T. F. Oakes elected to fill the vacancy; T. F. Oakes elected vice-president.

St. Louis, Mo., Oct. 20, 1876, James O'Neill resigned as director; Robert E. Carr elected to fill the vacancy; Adolphus Meyer resigned as president; Robert E. Carr elected to fill the vacancy as president.

St. Louis, Nov. 10, 1876, Adolphus Meier offered his resignation as director, dated October 31st, 1876; Theodore G. Meier elected to fill the vacancy. T. F. Oakes resigned as vice-president. C.
252 S. Greeley resigned as director; D. M. Edgerton elected as director to fill the vacancy caused by resignation of Mr. Greeley; D. M. Edgerton elected vice-president; C. S. Greeley resigned as treasurer; J. L. Woods elected as treasurer.

Stockholders' meeting, Lawrence, Kan., May 3, 1877; no election of directors held.

St. Louis, May 1st, 1878, J. L. Woods resigned as treasurer.

Lawrence, Kan., May 2, 1878, John D. Perry, Robert E. Carr, D. M. Edgerton, T. F. Oakes, Theodore G. Meier, S. M. Edgell, Dwight Tredway, Jay Gould, F. L. Ames, A. H. Holmes, Sidney Dillon elected directors.

St. Louis, May 15, 1878, officers elected: Robert E. Carr, president; D. M. Edgerton, vice-president; D. M. Edgerton, secretary; the president authorized to act as treasurer until one duly elected.

St. Louis, June 28, 1878, Robert E. Carr resigned as president and treasurer.

St. Louis, October 12, 1878, D. M. Edgerton resigned as vice-president and secretary, dated October 12, 1878; D. M. Edgerton elected president; S. M. Edgell elected vice-president; A. H. Calef elected secretary and treasurer.

New York, March 12, 1879, Messrs. Carr, Tredway, Edgell, Oakes, Holmes, Berry, and Theodore G. Meier resigned as directors; Russell Sage, C. S. Greeley, J. P. Usher, Addison Cammack, G. M. Dodge, James R. Keene, and James M. Ham elected to fill the vacancies; D. M. Edgerton resigned as president; Sidney Dillon elected as president; D. M. Edgerton elected as vice-president.

Lawrence, Kan., May 1, 1879, following directors elected: Sidney Dillon, Jay Gould, F. L. Ames, Russell Sage, G. M. Dodge, Addison Cammack, James R. Keene, C. S. Greeley, J. P. Usher, D. M. Edgerton, James M. Ham.

New York, May 1, 1879, following officers elected: Sidney Dillon, president; D. M. Edgerton, vice-president; James M. Ham,
253 treasurer; A. H. Calef, secretary.

New York, January 24, 1880, Jay Gould resigned as director, dated January 10, 1880; F. Gordon Dexter elected to fill the vacancy.

Further deponent saith not.

JAMES M. HAM.

Subscribed and sworn to before me this 24th day of Aug., 1882.

[SEAL.] W. W. COTTON,
Notary Public, Kings Co., N. Y.

Certificate filed in New York Co.

Endorsed: No. 3437. Lewis *vs.* Meier *et al.* Affidavit of James M. Ham. Filed Sept. 6, 1882. A. S. Thomas, clerk.

254 Circuit Court of the United States, District of Kansas. November Term, 1882. Equity.

BENJ. W. LEWIS, Jr.,
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, & THE KANSAS PACIFIC RAILWAY COMPANY.

MCCRARY, *Circuit Judge:*

This suit was originally brought to foreclose a mortgage executed by the Kansas Pacific Railway Company to certain trustees to secure

bonds to the amount of $6,500,000. The original bill has been dismissed and the case stands upon a cross-bill filed by the defendant company in which it is alleged that the mortgage above referred to is fraudulent and void and ought therefore to be cancelled as a cloud upon its title.

It is alleged that said mortgage was executed as part of a scheme whereby the directors of the company united with certain others to enter into certain contracts with the company to build a certain portion of the company's railroad and to receive certain considerations therefor; in other words, it is alleged that the directors of the company were members of a construction company to which the bonds secured by said mortgage were issued, and that they contracted fraudulently with themselves. Conceding for our present purposes the truth of these allegations, the question arises, Can the defendant company be granted the affirmative relief prayed for? The general rule is that a court of equity will not in such cases interfere in favor of either party either to enforce or set aside the contract or to award damages for its breach. The parties being in *pari delicto*, the court will leave them where it finds them. If this were a contract between natural persons there could be no doubt about the application of this doctrine, but it is said that the rule does not apply to the defendant corporation, because, while the contract
255 was made in the corporate name, the corporation is not, within the meaning of the rule, a party to it, since in making it the directors exceeded their authority. To sustain this view would be in effect to hold that a corporation can in no case be guilty of fraud, for, being an artificial being, it can act only through agents, and it would be impossible in any case to show that the charter of a corporation expressly authorized the perpetration of a fraud. It is, however, well settled that a corporation may be guilty of a fraud. The courts have gone further and held such artificial persons liable in tort in certain cases. The true rule is that such acts as are done by the directors in the course and within the scope of their powers and duties are to be regarded as the acts of the corporation. Such is the rule, even if the acts are unlawful and tortuous.

2 Hillard on Torts, 322.
Copeley *vs.* The G. & B. Sewing Machine Co., 2 Wood, 494.
Railroad Co. *vs.* Quigley, 21 How., 202.
Sanford *vs.* Hundy, 23 Wend., 260.
Brokam *vs.* The N. J. & C. Transp. Co., 32 N. J. Law, 331.
Fogg *vs.* Griffin, 2 Allen, L.
Rives *vs.* Plankroad Co., 3 Ala., 92.
Litchfield Bank *vs.* Peck, 29 Conn., 384.
Lee *vs.* The Village of Sundy Hill, 40 N. Y., 442.
Perkins *vs.* Railroad Co., 24 N. Y., 213.

These authorities abundantly show that if the directors or agents employed by a corporation conduct themselves fraudulently, so that if they had been acting for private employers such employers would have been affected by their frauds, the corporation is in like manner and to the same extent affected by them. In other words, the settled

doctrine is that a corporation can no more repudiate the fraudulent acts of its agents than an individual can. The rule is the
256 same as to both. The doctrine, as applicable to private individuals, is familiar. The principal is liable for the acts of the agents, not alone in cases where they are expressly authorized, but also in all cases where such acts come within the range of the agent's duties. In the case of the Railroad Company *vs.* Quigley, *supra,* Mr. Justice Campbell says: "The result of the cases is that for acts done by the agent of a corporation, either *in contractu* or *in delicto,* in the course of its business or of their employment, the corporation is responsible as an individual is responsible under like circumstances." In that case the corporation was sued for libel and held liable, the defense, that the defendant was a corporate body with defined and limited powers, being overruled. It was argued that the corporation being a mere legal entity it was incapable of malice, which is a necessary ingredient of a libel. The defense there, as here, was that the directors acted outside of their authority, and bound themselves as individuals only, but the court said (p. 209): "To support this argument we would be required to concede that a corporation could only act within the limits and according to the faculties determined by the act of incorporation, and that therefore no crime or offense can be imputed to it; that although illegal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created, by the direction of their dominant body, that such acts, not being contemplated by the charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents; and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto* or indictment will lie against a corporation for any misfeasance."

It is true that the question there was whether the corporation was liable in damages for injuries caused by a malicious libel, but
257 if the corporation is liable for one of the consequences of an unauthorized and illegal act of its agents, on the ground that the act was done "to accomplish objects for which it was created," it is clearly liable for all such consequences. Here one of the consequences of the illegal and fraudulent contract is that neither party shall be heard in a court of equity to demand any relief either enforcing or annulling the same. This is a rule of great general importance, and one which the courts are often called upon to enforce in the interest of sound morality and for the public good.

To sustain the present cross-bill would be to determine that the rule has no application to corporations and that these artificial persons who act from necessity only through agents, may, through such agents, enter into fraudulent and immoral contracts, and, after receiving their benefits, may ask a court of equity to cancel them on the ground that their agents made them without authority.

We cannot give our assent to such a doctrine. A very large proportion of the most important business of the country is transacted by these artificial persons and they control vast aggregations of wealth and exercise vast powers. It is the sound policy of the law

to apply to corporations, as far as possible, those rules of good conscience and equity which are enforced as between man and man. The contract now in controversy was made by the board of directors. for the purpose of constructing a railroad which the corporation was clearly authorized to construct. It was therefore within the general scope of their powers. The corporation may be permitted to defend against the contract on the ground that it was fraudulent, as alleged, but if so it is not because the corporation has any special claims to the favor of a court of equity in that regard, but solely upon the ground that neither party to a fraudulent contract (both
258 having participated in the fraud) can demand its enforcement.

The company is not entitled to affirmative relief, and therefore the cross-bill is dismissed.

J. P. Usher, for complainant in cross-bill; Glover & Shepley, for defendants.

Foster, dist. judge, concurs.

Endorsed: No. 3437. Benjamin W. Lewis *vs.* Adolphus Meier *et al.* Filed Dec. 1, 1882. A. S. Thomas, clerk, by F. J. Thomas, deputy.

259 November Term, 1882.

BENJAMIN W. LEWIS
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, and THE KANSAS PACIFIC RAILWAY COMPANY. } 3437.

THURSDAY, *December* 7, 1882.

This cause having been heretofore submitted to the court upon the pleadings and evidence, and now having been fully considered, it is by the [court] ordered, adjudged, and decreed that the counter-claim or cross-bill of the defendant, the railroad company, against complainant Lewis be, and the same is hereby, dismissed for the reasons stated in the opinion filed herein, and this without prejudice to the said company or affecting it in any manner in any defence that it may have to the mortgage mentioned in the pleadings in this cause, or the bonds purporting to be secured thereby. It is further ordered and decreed that the complainant pay all costs in the cause other than those arising from the said cross-bill, and as to those costs it is ordered that the railroad company, defendant, pay the same. And the def't railway company prays an appeal to the Supreme Court, which is allowed, and bond for appeal, with J. P. Usher, surety, in the sum of $500, is approved for said appeal.

GEO. W. McCRARY,
Circuit Judge.

260 Endorsed: No. 3437. Filed Jan. 11, 1883. A. S. Thomas, clerk.

261 UNITED STATES OF AMERICA, } ss:
District of Kansas, }

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy from the record of all the proceedings in the suit of Benj. W. Lewis, Jr., *vs.* The Kansas Pacific R'y Co. *et al.*, No. 3437 in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 2nd day of October, A. D. 1883.

[The seal of the Circuit Court of the United States, 1862, District of Kansas.]

A. S. THOMAS, *Clerk.*

262 In the Circuit Court of the United States, District of Kansas.

B. W. LEWIS, Jr.,
vs.
ADOLPHUS MEIER, CARLOS S. GREELEY, and THE KANSAS PACIFIC RAILWAY COMPANY.

It is stipulated and agreed that the defendant, The Kansas Pacific Railway Company, presented upon the trial of this cause its record-book and read therefrom the following:

OFFICE OF THE UNION PACIFIC RAILWAY COMPANY, E. D.,
SAINT LOUIS, MO., *July 12th*, 1865.

In pursuance of the last adjournment and notice thereof, the board met at the office of the company, in the city of Saint Louis, on this Wednesday the 12th day of July, 1865, at 3 o'clock p. m.

The members present were John D. Perry, president; Adolphus Meier, Carlos S. Greeley, John P. Usher, and John P. Devereux.

The minutes of the last meeting were read and approved.

The following resolutions were offered and adopted unanimously:

Resolved, That John D. Perry, president of this company, be, and he is hereby, authorized to contract with R. M. Shoemaker & Co. to construct the main line of this company's road and telegraph line to Fort Riley and also the Leavenworth branch.

Resolved, That this company receive the subscription of the board of commissioners of the county of Leavenworth for 5,000 shares of the capital stock of the company, and that the secretary issue to said commissioners certificates of stock for the same, and this company will receive in payment of the same the bonds of the said county of Leavenworth for $250,000 in accordance with the agreement between the commissioners and the company, and Gen'l T. L.
263 Price and R. M. Shoemaker are appointed a committee to receive the subscription, deliver the stock, and receive the county bonds.

On motion the board adjourned until Saturday, August 5th, 1865, being the regular monthly meeting of the board.

JOHN D. PERRY, *Pr't.*
JOHN P. DEVEREUX, *Sec'y.*

In connection therewith there was produced and read in evidence by the company defendant the certificate of stock mentioned in the above resolutions, as follows:

Certificate.

Shares $50 each.

Incorporated by the State of Kansas.

Union Pacific Railway Company, Eastern Division.

No. 7. 5,000 shares.

This certifies that the county of Leavenworth, Kansas, is the owner of five thousand shares of the capital stock of the Union Pacific Railway Company, Eastern Division, transferable in person or by attorney only upon surrender of this certificate.

Witness the seal of the company and the signatures of the president and secretary this first day of September, 1865.

JOHN D. PERRY, *President.*

[SEAL.] JOHN P. DEVEREUX, *Secretary.*

Upon which certificate there was found and read in evidence the receipt of H. W. Ide, county attorney of Leavenworth county, as follows:

LEAVENWORTH COUNTY, KANSAS, *September* 1, 1865.

Received certificate for the above.

H. W. IDE.

264 The defendant company also read from its record-book the following resolution, adopted August 18, 1866:

On motion of Mr. Meier it was—

Resolved, That the secretary is authorized to issue the amount of stock of this company due to H. M. Northrup for the purchase-money of a brick house in Wyandotte.

And then the defendant produced and read the following certificate issued to Northrup:

Certificate.

Shares $50 each.

Incorporated by the State of Kansas.

Union Pacific Railway Company, Eastern Division.

No. 8. 40 shares.

This certifies that H. M. Northrup is the owner of forty shares of the capital stock of the Union Pacific Railway Company, Eastern Division, transferable in person or by attorney only upon surrender of this certificate.

Witness the seal of the company and the signatures of the president and secretary this twentieth day of September, 1866.

JOHN D. PERRY, *President.*

[SEAL.] CHAS. B. LAMBORN, *Secretary.*

The defendant company also read from its record-book a resolution adopted at a stockholders' meeting held at Lawrence, Kansas, Jan. 5, 1871. Said resolution is as follows:

Resolved, That all the acts and proceedings of the board of directors of this company since the 19th day of August, 1865, so far as the same relates to contracts for the construction of the railroad of this company, and the settlement with the contractors, the
265 issuing of stock and bonds in payment for construction, the execution of mortgages upon the road and lands of the company, and the issuing of bonds secured thereby, and the disposition of the same are hereby approved, ratified, and confirmed.

On motion a call of stock was made upon the foregoing resolution and the same was adopted by the following vote, viz:

Seyfert, McManus & Co., Thomas A. Biddle, Jno. D. Perry, C. S. Greeley, Giles F. Filley, Thomas L. Price, S. M. Edgell, Adolphus Meier, J. P. Usher, Henry Martin, O. D. Filley, Robert E. Carr, Glover and Shepley, George D. Hall, D. B. Sale, James Smith, Wm. Hubbard, H. W. Wissman, Thomas J. Bartholow, F. W. Meister, James B. Eads, B. W. Lewis, Jr., J. C. Rust, S. T. Glover, J. R. Shepley, Barton Bates, C. B. Burnham, Charles Enslin, Joseph O'Neil, Thomas A. Biddle & Co., J. W. and W. J. Lewis, Dabney Morgan and Co., J. C. Reiff, Jno. R. Lionberger, James F. Comstock, Jno. S. Copelin, E. E. Barney, B. M. Chambers, Bartholow, Lewis and Co., Henry Dater, Phineas B. Leach, Geo. M. Edgerton, being a total of sixty-five thousand six hundred and fifty-five shares (65,655), voted "aye," and Leavenworth county, by Isaac E. Eaton, its proxy, representing five thousand shares (5,000), voted "no."

It also appeared from the record-book of the company in evidence that the following were directors of the company from 1865 to 1879, inclusive:

Directors of the company:

In 1865, to Aug. 19, they were John D. Perry, Adolphus Meier, Carlos S. Greeley, Giles F. Filley, John P. Usher, Alexander C. Anderson, and John P. Devereux.

Aug. 19, 1865, Greeley, Usher, Filley, and Anderson resigned, and in their stead were elected Thos. A. Scott, Wm. H.
266 Clement, Hugh J. Jewett, and Ashbell Green.

April 2, 1866, there were elected Perry, Devereux, Thos. L. Price, Meier, Geo. Partridge, Scott, Clement, John McManus, and Jewett.

April 1, 1867, there were elected Perry, Meier, Partridge, Greeley, Jewett, Scott, Price, McManus, and Clement.

April 6, 1868, there were elected Perry, Meier, Wm. M. McPherson, Greeley, Clement, Jewett, McManus, Scott, and Price.

April 5, 1869, there were elected Perry, Meier, Greeley, McPherson, McManus, Scott, Clement, Jewett, Price, S. M. Edgell, and Wm. J. Palmer.

April 4, 1870, there were elected Perry, Meier, Greeley, McManus, Scott, Palmer, Jewett, Edgell, Price, McPherson, and Rob't E. Carr.

May 14, 1871, there were elected Carr, Meier, Greeley, McPherson,

Perry, Edgell, B. W. Lewis, Jr., Scott, McManus, Mathew Baird, and Wm. Thaw.

It is further stipulated that the foregoing evidence was embraced and referred to in the abstracts furnished the circuit court under its rule and used upon the hearing, but by mischance copies thereof were not left upon the files, and it is stipulated and agreed that the clerk of the circuit court shall file this paper now as of the date of the submission of the cause, and shall certify the same to the Supreme Court as a part of ths record in the cause.

J. P. USHER,
Solicitor for Defendant Company.
J. W. GREEN,
Solicitor for Plaintiffs.

Approved.
C. G. FOSTER, *Judge.*

267 Endorsed: No. 3437. Benj. W. Lewis *vs.* Adolphus Meier *et al.* Stipulation. Filed Sept. 1, 1886. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a full, true, and correct copy of stipulation in the case of Benj. W. Lewis *vs.* Adolphus Meier *et al.*, No. 3437 in said court.

In testimony whereof I hereunto set my hand and affix the seal of said court, at my office, in Topeka, in said district of Kansas, this 3rd day of September, A. D. 1886.

[The Seal of the Circuit Court of the United States, 1862, District of Kansas.]

A. S. THOMAS, *Clerk,*
By FRANK J. THOMAS, *Deputy.*

268 [Endorsed:] No. 3437. Benj. W. Lewis *vs.* Adolphus Meier *et al.* Copy of stipulation.

Supreme Court U. S., 1886, October term. No. 149. The Kansas Pacific Railway Co., app't, *vs.* Benjamin W. Lewis. Certified copy of stipulation. [Stamped:] Office Supreme Court U. S. Filed Sep. 7, 1886. James H. McKenney, clerk.

Endorsed on cover: Kansas C. C. U. S. No. 149. The Kansas Pacific Railway Company, appellant, *vs.* Benjamin W. Lewis, Jr. Filed 12th October, 1883.

SUPREME COURT OF THE UNITED STATES.

No. 149.

ADDITION TO RECORD.

STATE OF KANSAS, *ss:*

In the Circuit Court of the United States for the District of Kansas.

BENJAMIN W. LEWIS, Jr.,

vs.

THE KANSAS PACIFIC RAILWAY COMPANY.

I, A. S. Thomas, clerk of said court, do hereby certify that upon the documents given in evidence in this cause, marked from No. 1 to No. 13, inclusive, proved by S. T. Smith in his deposition—upon each and every of said documents—[are] the initials S. T. S., of said Smith, and the initials of the notary, with the date on the document on which the paper was proved.

On document marked No. 1 is endorsed the following: No. 3437. S. T. S. 11–25–'81. J. W. Griffith, notary public. 11–25–'81.

On document marked No. 2 is endorsed the following: S. T. S. 11–25–'81. J. W. Griffith, notary public. 11–25–'81.

On document marked No. 3 is endorsed the following: Contract. No. 3437. Shoemaker, Miller & Co. and U. P. R'y Co., E. D. S. T. S. 11–25–'81. J. W. Griffith, notary public. 11–25–'81.

On document marked No. 4 is endorsed the following: S. T. S. 11–25–'81. J. W. G. 11–25–'81. No. 3437.

On document marked No. 5 is endorsed the following: 11–25–'81. S. T. S. J. W. G. 11–25–'81.

On document marked No. 6 is endorsed the following: S. T. S. 11–25–'81. J. W. G. 11–25–'81. No. 3437.

On document marked No. 7 is endorsed the following: S. T. S. 11–25–'81. J. W. G. 11–25–'81. No. 3437.

On document marked No. 8 is endorsed the following: S. T. S. 11–25–'81. J. W. G. 11–25–'81. No. 3437.

On document marked No. 9 is endorsed the following: S. T. S. 11–25–'81. J. W. G. 11–25–'81. No. 3437.

On document marked No. 11 is endorsed the following: 11–25–'81. S. T. S. J. W. G. 11–25–'81.

On document marked No. 12 is endorsed the following: 11–25–'81. S. T. S. J. W. G. 11–25. No. 3437.

On document marked No. 13 is endorsed the following: 11–25–'81. S. T. S. J. W. G. 11–25–'81. No. 3437.

UNITED STATES OF AMERICA, }
District of Kansas, } *ss:*

I, A. S. Thomas, clerk of said court, do hereby certify that upon the several paper documents given in evidence in the cause above entitled, numbered as above, from 1 to 12, inclusive, No. 10 omitted, there was, at the time of the filing of the same in this office, the initial letters and figures as above stated and set forth. On documents Nos. 1, 2, & 3 the name of Griffith is written as above stated.

In testimony whereof I hereunto set my hand and affix the seal of said court, at my office in Topeka, in said district of Kansas, this 17th day of January, A. D. 1887.

{ The Seal of the Circuit Court of the United States, District of Kansas. 1862. }

A. S. THOMAS, *Clerk.*

[Endorsed:] Supreme Court U. S. 1886, October term. No. 149. The Kansas Pacific Railway Company, app't, *vs.* Benjamin W. Lewis, Jr. Certified copy of omissions from record.

[Stamped:] Office Supreme Court U. S. Filed Jan. 20, 1887. James H. McKenney, clerk.

IN THE

Supreme Court of the United States.

No. 14.

THE KANSAS PACIFIC RAILWAY COMPANY,
APPELLANT,
vs.
BENJAMIN LEWIS, JR., APPELLEE.

And now comes the appellant, by counsel, and moves the court to set aside the submission in the above-entitled cause and to continue the same to the next term, and presents the following statement and reasons, viz.:

1st. This suit was brought by Benjamin W. Lewis as trustee, to foreclose an income mortgage executed by the Kansas Pacific Railway Company.

2d. The Railway Company answered, averring in substance that the mortgage and the bonds which it was intended to secure were fraudulently issued, and praying for their cancellation.

3d. The complainant was permitted on his motion to dismiss his bill, but the defendant company was permitted to proceed to maintain its contention that the mortgage and bonds were fraudulent, and further pleadings were filed to that end.

4th. On final hearing there was a decree dismissing the defendant's cross-bill, from which an appeal was taken to this court.

Hon. J. P. Usher, who was the attorney of record for the defendant in the court below, and also in this court,

filed his brief; and when the case was called in this court, Judge Usher not being present, and there being no appearance for the appellee Lewis, the case was submitted on said brief.

After the appeal the said Lewis resigned his position as trustee, as more fully appears by the affidavit of Artemas H. Holmes, hereto attached as a part of this motion.

Since at the time of the submission there was a want of a proper party defendant, the plaintiff in error submits this motion to the end that when the case is decided there will be no infirmity in consequence of a want of proper parties.

S. SHELLABARGER,
J. M. WILSON,
Att'ys of Appellant.

United States Supreme Court.

The Kansas Pacific Railway Company
vs.
Benjamin W. Lewis, Trustee.

STATE OF NEW YORK,
City and County of New York, } *ss:*

Artemus H. Holmes, being duly sworn, says that he is one of the counsel of the Union Pacific Railway Company, successor in interest of the Kansas Pacific Railway Company, and has been connected with both of said companies for several years in the capacity of general counsel. That on or about the month of October, 1885, and after the appeal in this cause, Benjamin W. Lewis, who was the trustee of the income mortgage of the Kansas Pacific Railway Company, had a controversy with the Union Pacific Railway Company in regard to the amount of his fees as such trustee; and that said controversy was settled and the fees of said Lewis, as trustee, were paid through the hands of deponent; and that upon such payment, and in or about October, 1885, the said Lewis delivered to deponent his resignation of the trusteeship, which deponent forwarded to the officers of the Union Pacific Railway Company, and that said company, on or about the same date, duly accepted said resignation; and that no trustee, as the

successor of said Lewis, has been appointed. Deponent makes the foregoing affidavit of facts from his personal connection and professional relations connected therewith.

ARTEMAS H. HOLMES.

Sworn to before me this 22d day of October, 1887.

[SEAL.] WM. J. HARDING,
Notary Public, Kings Co., N. Y.

Certificate filed in New York Co.

Supreme Court, U. S.
FILED
JAN 18 1887
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

THE KANSAS PACIFIC RAILWAY COMPANY,
Appellant,

vs.

BENJAMIN W. LEWIS, JR.
Appellee.

Abstract and Brief.

J. P. USHER,
Solicitor for Appellant.

In the Supreme Court of the United States.

THE KANSAS PACIFIC RAILWAY COMPANY,
Appellant,

vs.

BENJAMIN W. LEWIS, Jr.,
Appellee.

ABSTRACT AND BRIEF.

June 29, 1878, Benjamin W. Lewis brought his suit in the District Court of Douglas county, Kansas, against Adolphus Meier, Carlos S. Greeley and the Kansas Pacific Railway Company, defendants, (page 1 of Record), to foreclose a so-called "Income Mortgage," executed by the Union Pacific Railway Company, Eastern Division, then known by the name of the Kansas Pacific Railway Company, which mortgage was executed July 1, 1866, to secure the bonds of said company to the amount of $4,275,350. The bonds were of various denominations, to-wit: Of one thousand dollars, two hundred and fifty dollars and one hundred dollars, and were made payable to said Greeley and Meier, trustees, or bearer. Interest was to commence four years after date of the bonds, at the rate of seven per cent. per annum, payable out of the net earnings, as therein provided. For convenience and for the better understanding of the case as hereafter stated, a copy of the bonds and coupons is here set out, found in Record, pages 6 and 7:

UNITED STATES OF AMERICA.

INCOME BOND $100 *Dollars.* No. 254. LOAN OF $10,000 PER MILE. THE UNION PACIFIC RAILWAY COMPANY, EASTERN DIVISION. SEVEN PER CENT. INCOME BOND. ONE HUNDRED DOLLARS (100).

Know all men by these presents, that the Union Pacific Railway Company, Eastern Division, will pay to Carlos S. Greeley and Adolphus Meier, or bearer, one hundred dollars, lawful money of the United States of America, on the first day of July, one thousand nine hundred and sixteen, in the City of New York, with interest thereon from the first day of July, one thousand eight hundred and sixty-six, at the rate of seven per cent. per annum, said interest payable semi-annually out of the net earnings of the said Railway Company in the order of time at which the interest warrants hereto attached mature, and as provided in the deed of trust securing the entire issue of which this bond is a part.

This bond is one of an issue of bonds, all of date first day of July, one thousand *and* eight hundred and sixty-six, the payment of which is secured by deed of trust of that date, duly executed and delivered by the Union Pacific Railway Company, Eastern Division, to Carlos S. Greeley and Adolphus Meier, conveying the railway of said company and the equipments and appurtenances therein described, subject to the prior liens stated in said deed of trust, which has been duly recorded, and this bond is also on an equality in all respects with bonds of the denomination of $1,000, $250, and $100 each, issued by the said company to said Greeley and Meier, trustees, and amounting in the aggregate to $10,000 per mile, and no more, on the completed portion of said road. This bond shall not become obligatory until it shall have been authenticated by a certificate hereon and duly signed by the trustees.

In witness whereof, the said Union Pacific Railway Company, Eastern Division, have caused their corporate seal to be hereto affixed and the same to be attested by the signatures of their president and secretary on the first day of July, one thousand eight hundred and sixty-six.

The United States revenue stamps are affixed and cancelled on the mortgage given as security for these bonds.

[L. S.] JOHN D. PERRY,
President Union Pacific Railway Company.

Attest:

CHAS. B. LAMBORN,
Secretary.

COUPON.

The Union Pacific Railway Company, Eastern Division, will pay to

bearer three and $\frac{50}{100}$ dollars out of the net earnings of its railway, as provided in deed of trust to Carlos S. Greeley and Adolphus Meier, dated July 1st, 1866, for 6 months interest on its income bond No. 254.

JOHN B. PALMER,
Treas.

No..... $100.

INCOME BOND.

The Union Pacific Railway Company, Eastern Division, due July 1st, 1916. Coupons papable March 1 and September 1.

This bond is one of the series provided to be issued by the mortgage herein referred to, and no more bonds have been certified to by us than is provided for in said mortgage.

CARLOS S. GREELEY and
ADOLPHUS MEIER,
Trustees

To secure the payment of these bonds, the company, by its mortgage, transferred and conveyed to Meier and Greeley all its railway and telegraph line from Wyandotte, in Kansas, to such point west of the hundredth meridian as the grant in bonds from the United States extended. Also the branch road from Leavenworth to Lawrence. Also all the rolling stock, telegraph, station grounds and buildings erected thereon. For this see page 2 of the Record.

On page 3 of Record, it is alleged that the defendant corporation negotiated to parties who advanced valuable considerations therefor, the said bonds, and they became valid and subsisting debts of the company, and further that said mortgage covers the main line of the road from Kansas City to 394th mile post. On page 4 of Record it is alleged that the net earnings of the mortgaged portion of the road have been sufficient to pay the interest on the said Income Bonds, and that the company has failed to pay it. By said mortgage, made Exhibit B, (page 8 of Record), in case of

a vacancy in the trusts, as specified in article 5, (page 13 of Record), the complainant, Benjamin W. Lewis, was appointed and designated to fill the vacancy, (page 14 of Record); and by paragraph 15, (page 5 of Record), it is averred that Meier and Greeley had renounced the trust imposed upon them by said Income Mortgage, and had assigned all of said trust property to complainant, which assignments were entered upon the mortgage and made exhibits in the cause; and that holders of the bonds amounting to more than one hundred thousand dollars, had requested him in writing to bring suit. This mortgage was duly acknowledged and recorded in all the counties in Kansas along the line of the road mortgaged. See pages 15, 16 and 17 of Record.

Exhibit C of the Record contains statements of the supposed income of the mortgaged property, to which for the purpose of this appeal, it is not supposed to be necessary to make any special reference.

The railway company answered denying the petition. (Page 25.) On pages 26, 27 and 28 of the Record is found an instrument purporting to subordinate these Income Bonds to a mortgage proposed to be executed by the company for the purpose of raising funds to be used in extending the road to Denver. This agreement was executed by Meier and Greeley, trustees of the Income Mortgage, and purports to be an agreement between them and John Edgar Thompson, Adolphus Meier and John A. Stewart. It contains various recitals, but as they are not otherwise proved, it is supposed that this indenture is immaterial in the decision of this cause.

At page 30 of Record will be found the further answer of the railway company. That answer sets up as a de-

fense that the bonds purporting to be secured by the so-called Income Mortgage were wrongfully and unlawfully executed and were without any consideration to defendant. The answer then makes exhibits of certain contracts made by the railway company with R. M. Shoemaker and others, among whom were Mr. C. S. Greeley, for the construction of its railroad from Leavenworth to Lawrence. That the consideration in stock, bonds and land, agreed to be paid for the construction of the road mentioned in said contract was excessive—greatly exceeding the cost of construction. That the president and directors of said company were interested in the contracts and participated in the execution of the same; and that while the contracts were being performed the so-called Income Mortgage was executed, and the so-called Income Bonds purporting to be secured thereby were executed and delivered at the rate of ten thousand dollars per mile of the railroad contracted to be built as aforesaid, to the contractors, which were divided between them and the president and directors of the company; and that all persons and parties receiving said bonds who were interested in the construction contract, were well aware of the terms of the same and that the president and directors of defendant company who executed said mortgage and bonds, had absolute control of defendant company and were from the first interested in said contracts and participated in the execution of the same. It is to be here noticed that these contracts of July, 1868, did not provide for the delivery of the Income Bonds. These bonds were delivered in excess of any bonds contracted to be delivered by contract of July 1, 1868.

There is then a third paragraph to this answer, which avers that a further contract was made in October, 1866, relating to the construction of the road west of Junction City, which paragraph alleges that said contract was made by the president and directors of the railroad company with themselves. It is not deemed expedient to be more explicit in setting out the answer as the cause was finally tried upon pleadings made or intended to be made in conformity with the practice in the Federal Court. It must be here stated, however, that the answer of the defendant was in the nature of a counter-claim as well as a defense. The following is a copy of the last clause of the answer (page 32 of Record):

"And this defendent prays that upon the hearing of "this cause a decree may be entered annulling said so- "called mortgage and bonds, for the delivery of said "so-called bonds to defendant and for the discharging of "the so-called mortgage from record in all places where "it is recorded and for such other relief as to equity "doth belong."

There was a further paragraph inserted in the body of the answer, numbered and to be read as paragraph four. Suffice it to say that the answers in the district court of the state asserted and set out the facts showing that the bonds were delivered, or rather taken by the president and directors of the company and their associates, without the payment of anything for them.

To these answers a reply—a general denial—was filed. (Page 42).

The cause being at issue, June 18, 1880, came up for hearing, and Lewis sought to dismiss the suit, and presented and filed a paper concluding with these words:—

"I, the said Benjamin W. Lewis, Jr., plaintiff in this suit, do dismiss this cause without prejudice to any other that may be hereafter commenced on the causes of action sued on in said suit." (Page 44). Commencing on page 43 it appears from an entry at the bottom of the page that Lewis moved the court for leave to dismiss, and the railway company moved the court that its pleadings be considered and held to be a counter-claim and that it should have a right of trial on such claim, which motion the court sustained and set the cause for hearing at the next term of the court. Whereupon Lewis filed the paper dismissing the cause, as above stated. The pretext for dismissing the suit is found in a supposed decree, unproved, in the Circuit Court of the United States, which purports to enjoin Lewis from seeking the enforcement of the so-called Income Mortgage. See page 49 of Record. But that same supposed decree in its last clause (page 62 of Record) provides that the decree is made without prejudice to any defense which the railroad company may have to the Income Mortgage and Bonds. January 13, 1881, Lewis filed an amended reply to the answer of the railway company. (Pages 62-63). At the same time he filed his petition for the removal of the cause into the Circuit Court of the United States because of prejudice and local influence against him which would prevent him from getting a fair trial. The removal was ordered. (Page 66). The cause coming into the Circuit Court (page 67) at the June term, 1881, Lewis appeared and caused an entry to be made upon the record wherein he dismissed the action without prejudice to his bringing a new suit and prayed that the action be discontinued and dismissed, including the counter-claim and assigned three

reasons therefor. This motion was overruled. By order of the court, which was accompanied by a written opinion, found on page 153 of Record, filed June 8, 1882, the Judge in the opinion says that the state court having held the answer good as a cross-claim upon which affirmative relief could have been granted, the court considered that point adjudicated and overruled the motion. For order overruling motion see page 68. Thereupon the railway company had leave to replead (page 68). On August 1, 1881, within the time given by the order the railway company did file its supplemental pleading in accordance with the rules of courts of equity.

In this supplemental bill it is averred that there was executed in its name the three contracts set out in its answer in this cause, filed October 24, 1879, which contracts the complainant prayed should be read and considered and held to be a part of this pleading the same as if set out at length, and complainant averred that its board of directors were interested in the contracts and participated in the performance thereof from first to last. That said contracts were intended to be and were a shift and device by which said directors should be enabled to unite with others to construct the railroad and with such others to have and enjoy the considerations stipulated for in said contracts. The bill further avers that said directors did unite in the construction of defendant's railroad and did participate with the contractors in the receipt to their own use, of the bonds, stocks, lands and other property in said contracts mentioned, and did make and secure to themselves large profits and advantages which were intended and contemplated at the time of the making of the contracts; and after the con-

tracts dated July 1, 1865, had been in a manner performed, said directors to advantage themselves, determined to execute the mortgage and bonds set out in the petition of complainant Lewis, and did execute the same and caused the same to be recorded in all of the then organized counties in Kansas in which complainant's railroad, to be constructed under said contracts, was located, and did execute in the name of complainant the so-called Income Bonds in said mortgage specified and described. And then the bill goes on to aver that "all of said so-called "income bonds supposed and pretended to be secured by "said so-called income mortgage were issued and delivered "by the directors of complainant company in pursuance of "contracts made by the directors of complainant on behalf "of complainant, in which contract said directors were "pecuniarily interested, out of which large profits were "made by said directors and that said directors so inter-"ested, managed, controlled and directed the corporation "complainant and its affairs until after the commence-"ment of this suit by said Lewis, now made defendant, "which direction and control ceased soon thereafter."

Reference is made to the former pleadings in the cause for a statement and description of the mortgage, bonds and contracts and the tenor and effect thereof, with the prayer that the same may be considered a part of this pleading the same as if set out at length. Averment is made that the mortgage was executed without authority and that the bonds were executed without any consideration to the company therefor, and reference is made to the answers of the company in the cause for a further and more complete statement. It is averred that the mortgage recorded as aforesaid is a cloud upon the

title of the company to its property therein described and ought to be cancelled of record and such cloud removed; all which Lewis well knows but is without authority to cancel this mortgage unless directed by a decree of this court. Prayer that a decree may be entered in this cause "declaring said so-called income mortgage to "be illegal and void and directing said defendant "Lewis in apt words to enter upon the records in all "places where such mortgage is recorded satisfaction of "the same, so that the same shall no longer be an in-"cumbrance or cloud upon the right and title of com-"plainant in and to the property mentioned and described "in said mortgage and for such other order and decree in "the premises as shall be just and as to the rules of "equity doth belong."

Lewis, by his answer to this bill asserts his acquiescence to the way and manner in which the mortgage and bonds were executed and denies that they were executed as averred in the bill but avers that if it was true that they were thus executed the making of the mortgage and the issuing of the bonds by the same was of great benefit to the company and its stockholders and without them the company would not have been able to have completed its road. He answers and says that he believes, and so states, that at the time of the making of the agreements set out in the answer to the bill of Lewis, all the stockholders of the railway company, without exception, well knew of said agreements and each of them assented thereto and approved the same, and that the railway company is estopped from questioning the legality or validity of said contracts or either of them.

Lewis further answering says, that since the making of

the Income Mortgage by the railway company, bearing date July 1, 1866, to June 4, 1879, said railway company ratified, assented to and set up said Income Mortgage and the bonds secured thereby, the said mortgage as a good and valid lien and subsisting encumbrance against said company and its property described therein, and the bonds secured thereby, as good, valid and binding obligations; and particularly the said company recognized, ratified and affirmed said mortgage and bonds in a certain mortgage deed of said company dated June 20, 1869, made to Thompson, Meier & Stewart and called the Denver extension mortgage.

Further answering Lewis avers that after the lapse of so great a time from the making of the mortgage and the disposition of the Income Bonds before any action of the company alleging any supposed invalidity of the mortgage and bonds, that it would be inequitable to allow the railway company to question the same; and he sets up and relies upon the laches of the company as a full and complete defense to the claim of the company.

Further he answers and says that before he commenced his suit to foreclose the so-called Income Mortgage, he was made defendant in the Circuit Court of the United States to a bill brought by Meier & Stewart against him and the railway company, in which suit a decree was entered June 4, 1879, enjoining and restraining him from prosecuting any suit as trustee unless the trustee of the Denver extension mortgage was made party to the suit, and that in pursuance of that decree he dismissed his suit and that the railway company is estopped from prosecuting its counter-claim by reason of that decree.

He further answers and says that the Income Bonds had

been long before the institution of his suit and now are held by divers innocent purchasers from the persons to whom they were originally issued by the railway company, for which full value was paid to said original holders with the knowledge of the railway company that said sales were made, and without knowledge or notice that the bonds were issued without consideration or that the bonds and mortgages were not in all respects valid and legal, and asser that the company is estopped from denying the validity of the bonds and mortgage, and finally the answer avers that the bonds and mortgage are good, valid and subsisting instruments, and denies that the mortgage is a cloud upon the title of the company to the property in the mortgage described, or that the company is entitled to have the decree prayed for by it in the cross-bill, or any decree in the premises, and prays that the bill may be dismissed with costs.

Upon these issues depositions were taken. The principle witness for the railroad company was Mr. S. T. Smith. His testimony commences on page 74 of Record and concludes on page 88. It appears from his testimony that he was the auditor of the railway company, during the years 1865 to 1870, and that he had charge of all of the accounts of the company, financial and otherwise. He testified who were the directors of the company in 1865, after and during July of that year, and of the succeeding years, to 1875. It appears that there were nine directors in all and that John D. Perry was the president of the company (page 70) from 1865 to May 4, 1871, and that Robert E. Carr was president from May 4, 1871, until 1878, when D. M. Edgerton succeeded him and continued to act until 1879, when Sidney Dillon was

elected president of the company and who has ever since been such president. Mr. Smith proved the contracts of July 1st, 1865, set out on pages 32 to 35, inclusive. Also the contract of Oct. 1st, 1866, set out on pages 35 to 40 inclusive. These agreements are again set out in the evidence submitted, commencing page 130 and ending on page 139.

Properly these agreements and other documents proved by Smith should have been inserted directly after his testimony, yet it need not cause any confusion because they can readily be found in the Record. They are identified by the endorsements upon them of Mr. Smith, the witness, with his initials "S. T. S," and of the notary, J. W. Griffith, stating the date of the endorsement, and the papers are numbered from 1 to 11 inclusive. The initials of the witness and notary were omitted by the clerk in his copies of these papers and he has made and put upon file his certificate of the endorsements found upon these papers. It is assumed that opposing counsel will readily agree that the papers, 1 to 11 inclusive, were endorsed by the witness Smith and the notary, by affixing their initials thereto.

It will be observed from Smith's testimony that Mr. Perry as president of the railway company executed the contracts Nos. 1, 2 and 3, which are set out in the Record, pages 139 to 146 inclusive. That the persons who were directors, named by Mr. Smith on page 75, were with the exception of Mr. Devereux, interested in the contracts for the construction of the road contracted by Shoemaker and his associates; that the directors interested were at all times a majority in the directory of said company, and that they remained such majority

until March 12, 1879. See deposition of Mr. Ham, pages 154 and 155.

This suit was brought by Lewis, June 29, 1878. Certainly to that time, the company was controlled by a board of directors who were interested in these contracts and who, pursuant to these contracts, had issued to themselves capital stock, whereby they controlled the organization of the company. Smith testified (page 86) that he knew there were persons who claimed to have stock other than those mentioned in the paper marked "No. 12." Referring to paper No. 12, page 152, it will be observed that it is without date and appears to be a relinquishment to the company of stock purchased by the subscribers in July, 1865. Smith testifies further that there were persons other than those mentioned in the paper who claimed to have stock and some of them knew of these contracts. He also testified that the county of Leavenworth was a stockholder to the amount of $250,000, before October, 1866. It appears by a copy of the stock certificate, page 160, that stock was issued September 1, 1865. On page 87, he testified that there was a controversy between the company as it was then organized in 1865, with several old subscribers of stock about the validity of their stock. That the directors in 1869 were all of them interested in the contracts of July 1, and October, 1866, and all of them had Income Bonds distributed to them. And further, that there was a continued succession of directors of parties who were interested in these contracts up to 1869. He also testified that the railway company paid Shoemaker, Miller & Co. the bonds, stock, lands, &c., that were contracted to be paid

By reference to these contracts, Nos. 1 and 2, it will be observed that they contain no agreement to pay the contractors Income Bonds for the construction of the road.

Mr. E. C. Smeed testified (page 88) that the cost of construction of the road would be about fifteen thousand dollars per mile. That the material would cost about ten thousand dollars per mile.

Mr. C. A. Greeley, who was one of the original contractors for the performance of the contracts Nos. 1 and 2, stated (page 96) that he had one hundred thousand dollars in the first contract and seventy-five thousand dollars in the second contract. That almost all those who were owners of the stock were interested in the construction contracts. Page 97, he said he held one hundred and forty thousand dollars in Income Bonds. Note, in the print Mr. Greeley is made to say (page 97) that Mr. Jordan became President of the road. This is a misprint or an error of the clerk. It should read, Mr. Edgerton. Page 98, he testified that these Income Bonds were bought and sold to a limited extent prior to 1878. About 1878 they began to sell in the market rapidly. Page 100, he says these Income Bonds commenced to sell at ten and one-half cents and went up to eighteen and nineteen cents. Page 104.

"177 Q. For each dollar the subscribers put into these contracts—that is the first contract—how much did they get out in securities and stock?

A. Well, I can't answer that question definitely, for the reason that I didn't keep any books at all; didn't make a single entry on the book. I took all the bonds and all the stock which the contract awarded me and tucked it away in my trunk, and I haven't a book in the world to show how many bonds or shares of stock I received, or how many

Income Bonds I received. Mr. Gale kept the exact account, and if he was alive he could show exactly what he got, but I didn't; I just grabbed them and put them in my trunk and let them lay there.

178 Q. Did you get as much as 3 for 1?

A. Oh no; I got well paid for my investment; I sold my Income Bonds at 12½ cents, and the stock pretty cheap.

179 Q. Can you state how much the road actually cost in money?

A. Oh, we considered we were pretty well paid for taking such a risk. We were gambling fellows then, it is a fact, and I tell you it took bold men to go into a thing of that kind in those days; our conservative men wouldn't have anything to do with it."

The Income Bond account and to whom bonds were issued is proved by Mr. Greeley, commencing on page 106 and ending on page 119.

Mr. John D. Perry's deposition will be found in Record, commencing on page 119 and concluding on page 130. Mr. Perry proved that the three construction contracts were executed by him as president of the railway company and that all of the directors of the company with himself were interested in these contracts, with the exception of Mr. Devereux. It appears that Mr. Perry's interest in the contracts of July, in which the whole capital of the company was two millions, was two hundred and seventeen thousand dollars, and that he drew from his share of Income Bonds $112,840.00. He testified that upon the performance of the contracts of July 1, 1865, the railroad company owed the contractors, that is to say, the directors and their associates in the contracts, some four hundred thousand dollars, for which the directors agreed that the company should pay six hundred thousand dollars of the capital stock of the company, and four hundred thousand dollars in Income Bonds. See page 121 of Record, questions and answers 23, 24,

25, 26 and 27. By the contract of Oct. 1, 1866, (page 135 of Record) it is provided that the railway company shall pay to the contractors four hundred thousand dollars of the Income Bonds, and six hundred thousand dollars of the stock of the company, as the contractors shall pay the debts of the company thereinafter mentioned; and then, in that same contract (page 138 of Record), is found the following: "It is further understood and "agreed that in further consideration of the payments "hereinafter recited to be paid by the party of the first "part, the parties of the second part shall pay the "unfunded cash debts and obligations of the Union "Pacific Railway Company, Eastern Division, existing "at the termination of the contracts with Robert M. "Shoemaker & Co., estimated at $450,000, but not to "exceed $500,000."

It should be here remarked that there is no proof that there were any unfunded cash debts and obligations of the railway company at the termination of the contracts with Shoemaker & Co., other than may be inferred from the contract itself; and by the testimony of Mr. Perry, already referred to, such supposed debts and obligations were held by R. M. Shoemaker & Co. It is difficult to conceive how such debts could have existed, when by the contracts of July 1, 1865, R. M. Shoemaker & Co. were required to construct and stock the road. The amount of the supposed debts, it is clear, had not been adjusted at the time of making the contract of October, 1866, and since the parties to these contracts were directors of the company, the burden rested upon them to show that the debts were honestly and fairly incurred, and were due and ought to be paid; and even if this had been proved

and shown, these directors, their president and contractors, were without right to take to themselves one million of dollars of the assets of the company, in payment of a debt of four hundred and fifty thousand dollars, or five hundred thousand dollars at the utmost, which they claimed was due them, for advances which R. M. Shoemaker & Co. (of which firm the directors, with the exception of Devereux, were secret members) had made for the railway company.

It appears from the testimony of Mr. Greeley, very plainly, that the contractors, the president and directors of the company and their associates, received in bonds, stock and lands of the company, three or four times more than their outlay in the construction of the road. According to Smeed's testimony, before noticed, the excess was even greater than Mr. Greeley admits. But Mr. Greeley says he grabbed all he could lay his hands on and stuffed it in his trunk; and at the time of giving his testimony didn't know how much there was of it. It does not appear from the Record that the railway company at any time rendered any account of the net earnings of the line of road covered by the Income Mortgage, or did any act acknowledging the validity of the Income Bonds, unless the request to subordinate them can be thus construed.

The holders of the stock, issued to them concurrently with the Income Bonds, and for the same consideration, are not shown by the Record to have denied the validity of the bonds, while they remained holders of the bonds and stock. But the transferees of the stock, when separated from the Income Bonds, upon coming to the control of the corporation, by their directors repudiated the

bonds and demanded that the mortgage be cancelled. Leavenworth County was a stockholder in the company, holding five thousand shares of stock, of fifty dollars each. That county was not interested in the contracts for the construction of the road, nor is there any proof that the constituted authorities of the county had knowledge of the contents of the contracts, who or what parties were interested in them, or that the directors of the company had used, or were using the name of the company for the purpose of parceling out to themselves the assets of the company.

When the first contracts were made, the directors assumed that there had been over a million of dollars advanced by Mr. Perry, the president, and his friends, for and on behalf of the company, which the company had received and ought to account for; and so it was agreed between Mr. Perry and the company (which was represented by himself as president) and others who had participated in the advance, that this advance of a million dollars and more, should be paid in the capital stock of the company ar par. The stock was issued to Mr. Perry and John Edgar Thomson, in trust for the parties interested in the firm of of R. M. Shoemaker & Co., contractors, and the stock issued to Perry and Thomson was thereafter recognized as the only genuine stock of the company. That stock, actually the property of R. M. Shoemaker & Co., and the stock issued to R. M. Shoemaker & Co., was the only stock which was recognized to be valid and genuine, with the exception of the Leavenworth county stock, and forty shares issued to H. M. Northrup, Sept. 20, 1866. See Record, page 160. This is proved by Mr. Greeley and Mr. Perry. Thus R. M.

Shoemaker & Co. controlled the election of directors and elected members of their own organization to be the directors. That company controlled the corporation and had power to enter upon its records whatever their pleasure or interest might prompt them to do. And so R. M. Shoemaker & Co., and their associates made a majority of themselves directors, and by the contract of Oct. 1, 1866, again parceled out to themselves, the available assets of the company.

Such being the state of the case, the cause was submitted to the Circuit Court for decree, and His Honor, the Circuit Judge, December 1, 1882, filed his opinion in said cause. The opinion is found, commencing on page 155 and ending on page 158 of Record. In that opinion the following language is found:—"It is alleged that said "mortgage was executed as part of a scheme whereby the "directors of the company united with certain others to "enter into certain contracts with the company to build "a certain portion of the company's railroad and to re- "ceive certain considerations therefor; in other words, "it is alleged that the directors of the company were "members of a construction company to which the "bonds secured by said mortgage were issued, and that "they contracted fraudulently with themselves. Con- "ceding for our present purposes the truth of these alle- "gations, the question arises, can the defendant company "be granted the affirmative relief prayed for?"

ARGUMENT.

I.

It cannot be gainsaid that the three contracts dated re-

spectively July 1, 1865, and October 1, 1866, were made by the directors of the company with themselves and that they all, with the exception of Devereux, participated in the fruits of the contracts, and that they have received, as they expected and intended when the contracts were made, in the capital stock, bonds and lands of the company, at least four dollars for one invested in the execution of the contracts. Such agreements by universal law are vicious and, at the instance of the company, void. The decision of the supreme court, in Wardell's case, 103 U. S., 651, need only be invoked to establish this conclusion.

II.

Lewis, the present acting trustee and mortgagee and one of the associates in the contract, seeking to avoid the judgment of the law upon the transaction, claims,

1. That the bonds secured by the mortgage have been dealt in by parties other than those interested in the contracts with the knowledge of the company, and claims that such dealing works an estoppal *in pais* upon the company.

2. That all the stockholders in the company had knowledge of and approved the contracts, and that the company is estopped by that act to allege the viciousness of the mortgage. In this, the fact is overlooked that Leavenworth county and Northrup held five thousand and forty-four shares of the capital stock.

3. His further defense is that the company is estopped to deny the validity of the mortgage because of lapse of time, some thirteen years intervening between the date of the mortgage and the interposing the claim of its invalidity.

4. That the company is estopped to deny the validity of the bonds, because it asked the holders in 1869 to subordinate them to a further mortgage of $6,500,000.

Brief answer will be made to each of these claims in order.

1. There is no proof of any kind that any of the income bonds were dealt in, before the interposition of the defense, by any persons named, other than the parties originally involved in the contracts, except Messrs. Sidney Dillon and Jay Gould. They were then directors of the company, (Mr. Dillon being the president), and they, it must be presumed, demanded that the mortgage be decreed void. Certain it is that Mr. Dillon, the president of the company, supported by a majority of the directors of that time, is responsible for the acts of the company in demanding the decree sought; and though the validity of this mortgage was challenged for nearly three years before the trial of this cause in the court below, no one professing to be a bondholder came forward and made himself known in support of the pretensions of Mr. Lewis. The fair and legal inference is that the holders of all the outstanding bonds are connected with the original vicious transaction, either directly or indirectly, in such way as to make the case worse if they discovered themselves. The fact that no one appeared, claiming to be a *bona fide* holder is significant. But suppose the proof was that the bonds had been dealt in by innocent parties and in good faith, without knowledge of the vicious character, and that the company knew it, all this would not vary the rights of the company one particle, because until about the time of the interposition of

the defense the company was controlled by the parties who were responsible for and engaged in the vicious scheme; because there is no proof that the company, though controlled as it was, ever sought to have the bonds put upon the market or encouraged any one to deal in them, or indeed that it was even brought to the knowledge of the company in its corporate capacity that the bonds were being dealt in.

2. The claim that the mortgage is validated, if it is proved that all the stockholders assented to it, is not supported by law. By the law of this state, and as declared in the charter of the company the corporation exists, and is controlled by and through its capital stock. The corporation had the right under the law of 1862, in force at the date of this mortgage, to mortgage its road, rolling stock, &c., to enable the company to equip and operate the road, but the debt to be secured by the mortgage was wholly different from and independent of the stock. Through the instrumentality of the stock, directors were elected who by the charter should control the company. The directors possessed such powers only as the charter conferred upon them, and for the time being, were beyond the control of the stockholders. The powers of the directors were limited. They had authority to mortgage the road to raise money to construct, equip and operate it. The consent of the stockholders to do this, added nothing to their power, neither would the objection of the stockholders detract anything from it. It is not a question here whether the stock was to the same extent, and in the same manner, vicious, as the bonds and mortgage. The matter to be considered is, were there directors,

controlling the affairs of the company, and if so did they assume to and did they in fact, control the affairs of the company according to law? There were directors and they undeniably violated their trust. By the testimony of S. T. Smith, (page 74 of Record) there was a board of directors, consisting among others, of Perry, Greeley and Giles F. Filley, elected for the year 1865. There must therefore have been stockholders to elect them. What number of shares were voted to elect them is not disclosed by the Record. But it cannot be denied that there were stockholders. Two of these directors, Greeley and Filley, afterwards, August 19, 1865, resigned and became contractors in the contracts dated July 1, 1865. Others resigned August 19, 1865, and their places were filled with associates in the contracts. When the scheme was entered upon in June 1865, or about that time, it was determined to convert one million of dollars, which Perry and his assooiates had before advanced to the construction of the road, into capital stock, and into that million of dollars the stock voted, which elected Perry, Greeley, Filley and others was sunk, or if not, was repudiated, and if repudiated, all the worse for the income bonds and mortgage. The testimony of Greeley, not specially noted in the abstract, tends to prove that these shares were a part of the million of dollars of stock. That stock was held by Perry and Thomson in trust and had the power to control the company at the next election. But we are not driven to the argument that if the stockholders approved, the mortgage was valid, because it was not approved by the stockholders. True a majority of them did in 1871 expressly approve and it would be doing violence to say that stock-

holders receiving the bonds for nothing would not, after consenting to receive the bonds, approve their own act. The counties of Leavenworth and Northrup were genuine stockholders, in no way connected in interest in the contracts, and the county, represented at a stockholder's meeting January 5, 1871, upon an attempt being made by holders of stock, growing out of the vicious contracts, to have the action of the board of directors in respect to such contracts, approved, voted "No." It can not be contended but that the acts of all the parties at this meeting were entirely consistent with their interests. Those who had benefitted by the vicious contracts wanted the outside party to agree to their gain. That party, having received no benefit, refused, and so nothing was gained by the resolution. Northrup's stock was not represented at the meeting. It was sought to be proved by Mr. Greeley that the board of county commissioners of Leavenworth county knew of and approved the contracts. There was an entire failure to do this, and it is not supposed that it will be claimed that such proof was made. These contracts, dated July 1, 1865, contain no provision for payment in income bonds; indeed, these bonds and the mortgage in question had not even been considered, and it is quite preposterous to pretend that the county commissioners of Leavenworth county had any knowledge of such mortgage. And here it may be said that the claim that it was necessary to execute this mortgage to secure the construction of the road is superlatively absurd, inasmuch as the contract was to construct the road for stock instead of bonds. Manifestly the income bonds and mortgage were an after-thought, supposed to be better than the stock, and inasmuch as the contractors

had the absolue control of the company, they caused the bonds and mortgage to be executed, and apportioned the bonds among themselves, yielding nothing therefor.

3. As to the third claim, it is first to be remarked that it is quite inconsistent with the idea that the company could only resist the mortgage in a defense against it, for if that be so, no lapse of time could be urged, for the whole matter would depend upon the volition of the holders of the bonds. Until they moved, nothing could be done; but this is not the true theory of the case, for how was it to be expected that the company would move to have the mortgage canceled and the bonds surrendered, while it was controlled by the holders of the bonds. The Record in this case explains the whole matter. So long as the organization of the company was in the hands of the holders of the bonds no objection was made. When the control changed, the objection came. Sidney Dillon was president of the company when the decree upon the $6,500,000 mortgage was made. He took care that the decree should contain a provision that the company should be at liberty to contest the validity of the mortgage and bonds, and immediately full defense was made to this suit in the state court.

Some time after, Lewis sought to dismiss this suit to foreclose this mortgage, alleging that he was enjoined from proceeding to foreclose it except in this court in a suit in which Stewart should be a party, and though this branch of the decree was a nullity, instead of removing the cause and making Stewart a party, he did dismiss. Our Kansas statute provides that a plaintiff may at any time dismiss his suit without prejudice. *Compiled Laws of Kansas, 1879, chap. 80, sec. 397,*

page 653. But it also provides, in the next section, that the defendant may upon his counter-claim proceed to judgment, though the plaintiff shall dismiss his action. If the suit had been in this court the counter-claim being presented in the form of a cross-bill, which it really is, the plaintiff would not have been allownd to dismiss without prejudice against the objection of the defendant; but he availed of the statute, and after all the result is the same. If the company succeeds upon its counter-claim, now reformed so as to conform to the practice of this court, the dismissal by the complainant of his bil will be an immaterial matter.

The sections of the statute above referred to are as follows:

SEC. 397. An action may be dismissed without prejudice to a future action:

FIRST. By the plaintiff before the final submission of the case to the jury, or to the court, where the trial is by the court.

SECOND. By the court, when the plaintiff fails to appear on the trial.

THIRD. By the court, for the want of necessary parties.

FOURTH. By the court, on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence.

FIFTH. By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action.

SIXTH. In all other cases, upon the trial of the action, the decision must be upon the merits.

SEC. 298. In any case when a set-off or counter-claim has been presented, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed his action or failed to appear.

4. Some stress was laid upon the fact that the railroad company sought and obtained from the holders of all but about two hundred and fifty of the income bonds, their subordination to a mortgage of June 20, 1869, to

secure six million, five hundred thousand dollars; the same upon which the decree passed in favor of Stewart, one of the trustees.

It cannot be perceived how that transaction can be invoked as proof of the validity of the income mortgage.

What are the facts respecting this transaction? They are: (1) That the railway company was in the control and management of the parties to the vicious contracts, the stock and the bonds which they held were the fruits and results of such contracts. (2) They wanted to improve their value. (3) In casting about how that should be done, they found they had overloaded the property with this fictitious mortgage, and because of it they apprehended that they could not float the bonds to be secured by the six and a half-million mortgage; (4) and so the directors resolved that the expedient thing to be done was for them and their associates in the contracts, holders of the income bonds, to subordinate them, whereby they believed their value would be in fact improved because of the completion of the road, making it a through line.

Now this was their own scheme and plan. The income bonds and mortgage were confessedly illegal and void. It cannot be said that there was any consideration involved in the transaction, passing to or from either party, any new promise, upon any consideration by the company to the holders of the bonds subordinated. Some of the holders refused to subordinate, but it is not supposed that their refusal varies the case. Why they refused may be that their holding was limited, that they entertained the opinion that the bonds secured by the six and a half million mortgage could not be floated,

unless all were subordinated, and by withholding their assent they could coerce the larger holders to buy them out. As it turned out, according to Mr. Greeley's testimony, the bonds secured by the six and a half million mortgage were sold at less than ninety cents, and it is not unreasonable to presume that their sale value was affected by this false income mortgage, and further that if the company had not been controlled by parties whose interest led them to make the most possible out of the income bonds and mortgage, legal proceedings would have been instituted to cancel that mortgage and compel a surrender of the bonds to the company. All, the learned and unlearned, must admit that that was the right and proper thing to have done. Those who subordinated have not the right, and much less have those who refused, the right to claim the favorable consideration of a court of justice because of any fact growing out of the transaction of subordination. The effect sought to be obtained by the claim is, that upon proof of the affirming the validity of the vicious mortgage and bonds, by the directors and their associates in the vicious contract, the bonds and mortgage are good. If such position is sound there would be no trouble in establishing the mortgage. Mr. Greeley testified that he did not know why the bonds and mortgage were not good—as good as any of the other securities which the directors had made and divided among themselves and their associates. He is quite right about that. The securities, if yet in the hands of the directors, contractors and associates—original distributees and parties to the vicious contracts, would all of them fall and nothing could be recovered of the corporation on account of them, beyond the money

actually expended in the construction of the road. So much was decided in *Thomas' case, 109 U. S., 522.*

So far as Mr. Greeley, and all his associates and holders with knowledge are concerned, one class of bonds is as good as another, and it would not be expected that he would perceive any difference.

Here it is to be observed that there is absolutely no proof that there is an *innocent* holder of any of these bonds. True, Mr. Perry testifies that brokers bought the bonds in 1878, but who did they buy for? Was it for one of the parties in the scheme for issuing them, or for a party who had full knowledge of it? If there was an innocent holder of these bonds, one who had purchased them upon the representation of their validity by the company, in such way and manner as to estop the company from denying their validity, might we not reasonably expect that such party would have appeared in this action, proved his equity, and supported Lewis in resisting the decree sought? As trustee it is fair to presume, indeed it must be presumed, that if such party existed, he would have known it, and in conjunction with such party presented the facts to the court upon the trial. Because no such case was made or attempted, the inevitable conclusion follows that there was no such party, that the holders of all the bonds are and were at the time they received the bonds, conscious of the wrong, and preferred to take the blind chance rather than unmask themselves and submit the true state of their case to the court.

It is not to be overlooked that Mr. Lewis, trustee, was one of the parties to the contract of Oct. 1, 1866, and that the accounts show that he received $80,100 of these

income bonds. See page 147 of Record. He had one hundred shares out of two thousand eight hundred shares of one thousand dollars each. See page 148 of the Record. He signed an obligation with Greeley, Carr and Edgell to unite with them in performing the contract of Shoemaker, Miller & Co., of Oct. 1, 1865, called the Shoemaker, Miller & Co. contract. He was, therefore, chargeable with notice of whatever payments Shoemaker, Miller & Co. made to Shoemaker & Co., which was estimated at the time of the contract, at four hundred and fifty thousand dollars, for which see Abstract, *supra*.

Lewis being charged with knowledge of the payments, if any were made, and on what particular account they were made, the burden was upon him to show the integrity of the transaction.* The duty of making a full explanation, by showing what sums were paid by Shoemaker, Miller & Co., to R. M. Shoemaker & Co., on account of the railway company, the times of payments, and for what the payments were made, whether for work, for cash advanced or for any other possible reason, rested upon him. It is unfair and inequitable to attempt to maintain this income mortgage upon the pretext that Shoemaker, Miller & Co. had paid four hundred thousand or more dollars to R. M. Shoemaker & Co., for and on account of the railway company; and for that reason the directors and their associates could make lawful claim to the four hundred thousand dollars of income bonds which they had divided among themselves. What are the facts? It fairly appears that the directors and their associates had not been able to absorb all the income bonds provided by the mortgage. There were four hundred left after applying ten thousand dollars per mile of the road

* Sir Clement's vs. Moon 6 Wall. 318

covered by the three contracts, although in the two former there was no provision for payment in income bonds. Nevertheless they were paid out on those contracts at the rate of ten thousand dollars per mile. And ten thousand dollars more per mile was agreed to be paid by the third contract; and yet four hundred thousand dollars would be left. So the directors and their associates all being directors and contractors, in all the contracts assumed in the contract of Oct. 1, 1866, that the company owed them, as contractors under the name of R. M. Shomaker & Co., four hundred thousand dollars or more, and they would demonstrate their forbearance and sense of justice and equity by appropriating to themselves the remaining four hundred thousand dollars of income bonds and six hundred thousand dollars of the capital stock of the company. All this they actually did, and Mr. Lewis, trustee, and one of the head men in the affair, with more than one hundred thousand dollars of these income bonds in his pocket, and neither Mr. Greeley nor Mr. Perry with their trunks full of income bonds and stock, have conceived that any duty rested upon them or either of them to show independent of their own statement in the contract that the railway company owed Shoemaker, Miller & Co. anything. The question recurs, was the burden of proof upon Lewis to show that there *was* a good and valid consideration for the delivery of these four hundred thousand dollars of income bonds, or was it upon the railway company to show that there was *not* such a good and valid consideration therefor? These contractors, embracing within their circle all of the directors, with one exception, used the name of the railway company from June or July, 1865, until

they had absorbed the assets of the company in bonds, lands and stock, to the extent of more than twenty millions of dollars, and had returned therefor, according to Smeed's testimony, a road costing between five and six millions of dollars, together with some rolling stock. None need be surprised that the income bonds sold for but ten cents on a dollar, as testified by Mr. Greeley. The claim that these bonds were bought and sold is not proven, except to a very limited extent. But if they had been freely bought and sold, the claim of the railway company that they were without sufficient consideration to support them and illegal, would not be varied, because there is not a particle of evidence in the case that the railway company ever sold one of these income bonds, or placed them upon the market for sale or did any act which would cause even an imprudent or careless party to deal in these bonds. Whatever was done in that respect, was done by the parties who had made these bonds in the name of the company, and put them afloat. In respect to the bonds it may well be said that the corporation was dumb before its shearers.

Besides all this, the bonds are not negotiable paper—paper such as is governed by the law merchant. The coupons are part and parcel of the bond and are payable only out of the *net earnings* of the road. It was not and is not pretended by Lewis that the bonds are negotiable paper, or that it is not open to the company to make any defense thereto, that it could have made if the bonds were all remaining in the hands of the several contractors, the directors and their associates, even though such parties may have transferred the bonds to others. Of such paper there can be no innocent purchasers or *bona*

fide holders, within the meaning of the law merchant. But Lewis endeavors to maintain that the bonds were bought and sold with the knowledge of the company, and for that reason the company is estopped from denying their validity. This pretense is quite inconsistent with the opinion of the Circuit Court, for by that opinion it is said that the company may be permitted to defend against the contract on the ground that it was fraudulent as alleged, but that it can take no affirmative measures to rid itself of the fraudulent contract. How then can there be an estoppal *in pais* when the company is without the power to arrest the wrong? The opinion of the Circuit Court is in conflict with each of the reasons interposed by Mr. Lewis in his answer against the relief sought.

In this controversy we find that the trustee commenced this suit to foreclose the mortgage, and that its validity was denied, and when the issues were formed (which if tried would have settled the question whether the mortgage was valid or not, and if so whether there were net earnings, and if the mortgage was found to be illegal and the bonds without consideration, whether the mortgage should be decreed canceled and satisfied of record) Mr. Lewis determined to dismiss his suit, which it seems he had the right to do under the statutes of Kansas, in a court of which, the suit was pending. But though he might lawfully dismiss his suit, he could not by that same statute, avoid the counter-claim. Now if this suit had been in the Federal Court and a cross-bill, praying the cancellation of the mortgage, had been filed and issue taken upon it, he would not have been allowed to have dismissed his suit without prejudice. Upon dismissal of the bill the decree prayed upon the cross-bill would have

followed without proof as of course, because by the dismissal of the bill the complainant would have acknowledged that the answer was true, denying the validity of the mortgage, and that the prayer of the cross-bill ought to be decreed.

Now in this case the use of the name of the company and the affixing of its seal is not denied. The claim is that it was illegally executed; that it was and is a fraud. Such transactions are denominated frauds in Wardell's case, *supra*.

5. ~~Finally, as to the suggestion by the court that the alleged illegality of the mortgage, might be a matter of defense only~~. The fact that the trustee did commence the suit, in which the validity of the mortgage was denied, has already been referred to. To hold that the trustee can in his discretion determine when, and when only the issue of the validity of the mortgage shall be made and tried, would, it is submitted, be a reproach to the administration of justice. It has already been stated that if the suit had been in this court, the practice of which is not prescribed or limited by the Kansas Statutes, the trustee would not have been allowed to dismiss his suit, denying the validity of the mortgage, over the answer, without prejudice. In such case, with a cross-bill, praying for the cancellation of the mortgage and the discharge of the same of record, the decree upon the cross-bill would have followed, without proof, as of course, because by the dismissal of the bill the complainant would have acknowledged that the answer was true, and that the prayer of the cross-bill ought to be decreed.

It has been decided over and again that a mortgage obtained by fraud is void and that a discharge of it may be decreed in equity.

Mason v. *Daly*, *117 Mass.*, *403*.

Wartemberg v. *Spiegel*, *31 Mich.*, *400*.

Richardson v. *Barrich*, *16 Iowa*, *407*.

Terry v. *Tuttle*, *24 Mich.*, *206*.

It is no answer to the demand that the mortgage be satisfied of record, to allege if it be a fraud there is no loss and is therefore *damnum absque injuria*. The mere existence of the mortgage is itself an injury, and an action to enforce it a greater.

Gross v. *McKee*, *53 Miss.*, *536*.

It is not supposed that the court will be embarrassed in proceeding to enter the decree prayed, because the illegality of the mortgage is asserted by the railroad company and affirmative relief demanded, though the trustee protests, and has endeavored to withdraw from the controversy.

Contracts of this character are prohibited and upon demand are decreed to be cancelled for the protection of the party against an undue advantage which the other party possesses over it. This rule has been frequently applied to usurious contracts secured by mortgage. They are void as to the mortgagee; but where a mortgage was made to secure a debt usurious in part only, the court refused a decree that the mortgage be surrendered and canceled, as a cloud on the title to his lands, until he paid the valid part of the debt secured by the mortgage.

Williams v. *Fitzhugh*, *37 N. Y. 444*.

This case demonstrates the right of the mortgagor to a

decree cancelling the mortgage if it be illegal, because it is a cloud upon his title.

The simple fact is, that the use of the name of the corporation, and the affixing of its corporate seal to this income mortgage, was without authority. The bonds which were made in the name of the company, though bearing its name and seal were, in law, the individual bonds of the directors and their associates in the contracts. They were made solely for their own use, and the name and seal of the company wrongfully used.

The fact is, the Circuit Court trying this cause, wholly mistook the case. It proceeded upon the theory that the corporation as such, executed the mortgage in the performance of a corporate right and duty. In that the court was mistaken and erred. It might as well be said that an obligation executed by an agen ftor his own use and purposes, in the name of his principal, was an obligation of the principal, against which he could obtain no relief until the holder of the obligation chose to bring suit upon it. The Circuit Court held that the corporation was equally at fault with its directors in the execution of this mortgage. In the opinion it is said:—"The parties being in *pari delicto* the court will leave them where it finds them." And in the final order dismissing the cross-bill (page 158 of Record), the following occurs:—"And this without prejudice to the said company or affecting it in any manner in any defense that it may have to the mortgage mentioned in the pleadings in this cause, or the bonds purporting to be secured thereby." Words would be wasted in argument showing that the corporation was not a party to the fraud. Its name was

wrongfully used by its directors to secure to themselves an unlawful gain? It is preposterous in the extreme to say that the railroad company was in *pari delicto* with its directors who for their own gain executed this mortgage. It was in form only the instrument of the railroad company. And since it is an overhanging cloud upon the property of the corporation the decree of the Circuit Court ought to be reversed and a decree entered according to the prayer of the cross-bill.

In *Martin* v. *Graves*, 5 Allen 601, the court stated the general rule:—"Whenever a deed or other instrument "exists, which may be vexatiously or injuriously used "against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion "over his title or interest, *and he cannot immediately "protect or maintain his right by any course of proceedings at law*, a court of equity will afford relief by "directing the instrument to be delivered up and cancelled, or by making any other decree which justice "and the rights of the parties may require."

The rule just quoted is the true rule—the rule laid down in all the reports and text books. Here we have a case showing how important the application of this rule is. Suit was brought to foreclose the mortgage and issue joined upon its validity. The suit would necessarily fail unless Lewis could prove there were net earnings. But in order that it should not fail as respected the validity of the bonds and mortgage, the company made an issue upon the validity of those papers. Lewis withdrew from the litigation and according to the ruling of the Circuit Court, this mortgage and these bonds would remain for adjudication until they became due in 1916, and by the

statutes of Kansas, for five years thereafter. In the meantime all the actors in the transaction—persons who had any knowledge of the same, will in the course of nature, pass away. To say that a court of equity is without jurisdiction to correct the wrong is monstrous. The appellant therefore alleges and assigns for error that the Circuit Court having found as it ought to have done, that the income bonds and mortgage were fraudulently executed, without any consideration to the appellant, erred in holding and deciding that it was without jurisdiction and power to enter a decree cancelling said mortgage of record. Wherefore said appellant prays that said deeree may be reversed and a decree entered according to the prayer of the cross-bill and counter-claim.

J. P. USHER,

Solicitor for Appellant.